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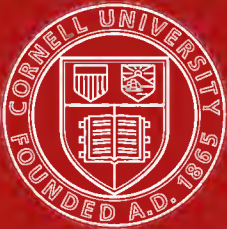
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REPORT

TO THE

SPANISH LEGATION

WITH REFERENCE TO THE

LEGAL ASPECT OF HOSTILITIES COMMITTED BY VESSELS SPECIALLY
ADAPTED, IN WHOLE OR IN PART, WITHIN THE UNITED STATES
TO WARLIKE USES, AND BY MILITARY EXPEDITIONS AND
ENTERPRISES CARRIED ON FROM THE TERRITORY OF
THE UNITED STATES AGAINST THE SPANISH
DOMINION IN CUBA DURING THE
PRESENT INSURRECTION.

ACCOMPANIED BY FIVE APPENDICES.

CALDERON CARLISLE,
LEGAL ADVISER OF THE SPANISH LEGATION.

WASHINGTON, D. C., JULY, 1896.

WASHINGTON, D. C., JULY 27, 1896.

EXCMO. SENOR

DON ENRIQUE DUPUY DE LOME,
ENVOY EXTRAORDINARY AND MINISTER PLENIPOTENTIARY
OF H. C. M THE KING OF SPAIN.

SIR :

I HAVE THE HONOR TO TRANSMIT HEREWITH PRINTED COPIES OF A REPORT PREPARED AT YOUR REQUEST, WITH REFERENCE TO THE LEGAL ASPECT OF HOSTILITIES COMMITTED BY VESSELS SPECIALLY ADAPTED IN WHOLE OR IN PART WITHIN THE UNITED STATES TO WARLIKE USES, AND BY MILITARY EXPEDITIONS AND ENTERPRISES CARRIED ON FROM THE TERRITORY OF THE UNITED STATES AGAINST THE SPANISH DOMINION IN CUBA DURING THE PRESENT INSURRECTION, ACCOMPANIED BY FIVE APPENDICES.

THE MATTER CONTAINED IN THE APPENDICES HAS BEEN COLLECTED FROM WIDELY SCATTERED SOURCES, AND IS FOR THE FIRST TIME BROUGHT TOGETHER IN ONE VOLUME.

THE PURPOSE OF THE REPORT IS TO REVIEW THE ATTITUDE OF THE GOVERNMENT OF THE UNITED STATES, IN ALL ITS BRANCHES, TOWARDS THE SUBJECT OF NEUTRALITY, FROM THE ADOPTION OF THE CONSTITUTION DOWN TO THE PRESENT DATE. AND WHILE THE APPENDICES ARE CONFINED TO THE OFFICIAL UTTERANCES OF THE UNITED

STATES, THROUGH ITS EXECUTIVE, LEGISLATIVE AND JUDICIAL DEPARTMENTS, THE REPORT PROPER, BY MEANS OF APPROPRIATE CITATIONS FROM THE CASE OF THE UNITED STATES, AT GENEVA, DEALS WITH THE ATTITUDE OF THE UNITED STATES TOWARDS GREAT BRITAIN FROM 1861 TO 1865, AND IN THE ARBITRATION, WITH THE ATTITUDE OF SPAIN TOWARDS THE UNITED STATES DURING OUR CIVIL WAR, 1861-1865, BY CITATIONS FROM THE DIPLOMATIC CORRESPONDENCE, AND WITH THE EXPERIENCE OF THE UNITED STATES DURING THE PREVIOUS INSURRECTION IN CUBA, CLOSING WITH A BRIEF REVIEW OF WHAT HAS TAKEN PLACE DURING THE PRESENT INSURRECTION, AND DRAWING CERTAIN INEVITABLE CONCLUSIONS FROM THE MATTER CONTAINED IN THE APPENDICES AND REVIEWED IN THE REPORT.

AT THE END OF APPENDIX V, I HAVE THOUGHT PROPER TO REPRINT IN FULL ALL THE PROCEEDINGS IN THE CASE OF WIBORG ET AL. VS. THE UNITED STATES, IN THE SUPREME COURT OF THE UNITED STATES.

THIS CASE IS NOT ONLY REMARKABLE IN BEING THE FIRST CASE OF A CRIMINAL PROSECUTION UNDER THE NEUTRALITY LAWS OF THE UNITED STATES TO COME DIRECTLY BEFORE THE SUPREME COURT ON ITS MERITS SINCE THE PASSAGE OF THE ORIGINAL NEUTRALITY LAW IN 1794, BUT ALSO BECAUSE OF THE CIRCUMSTANCES OF THE HEARING OF THE CASE AND THE PROMPT DISPOSITION OF IT BY THE TRIBUNAL OF LAST RESORT IN RESPONSE TO THE SOLICITATIONS AND CONTENTIONS OF THE

HIGHEST LAW OFFICERS OF THE GOVERNMENT OF THE UNITED STATES.

THE SPIRIT AND LETTER OF THE SUPREME COURT'S PROCEEDINGS AND DECISION ARE SUCH THAT IT IS BELIEVED IMPORTANT PRACTICAL RESULTS IN PROSECUTIONS OR PROCEEDINGS UNDER THE NEUTRALITY LAWS OF THE UNITED STATES MUST FOLLOW.

BUT WHETHER THESE PRACTICAL RESULTS SHALL BE ATTAINED OR NOT, YOU WILL HAVE THE SATISFACTION OF KNOWING THAT THE THEORY WHICH YOU HAVE SO EARNESTLY AND ACTIVELY URGED UPON THE GOVERNMENT OF THE UNITED STATES WITH REFERENCE TO THE OPPORTUNITIES AFFORDED AND DUTIES IMPOSED BY THEIR OWN LAWS, HAS BEEN IN A LARGE MEASURE CONFIRMED AND APPROVED BY THE ULTIMATE EXPOSITOR OF THE TRUE INTENT AND MEANING OF THOSE LAWS.

I HAVE THE HONOR TO BE

YOUR OBEDIENT SERVANT,

CALDERON CARLISLE,

Legal Adviser of the Spanish Legation.

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ERRATA.

REPORT :

- p. 4, line 26, insert word "to" after "only."
- p. 4, line 33, insert word "be" after "to."
- p. 8, line 3 from bottom, insert word "of" after "on."
- p. 29, line 10, for "1865" read "1895."

APPENDIX IV :

- p. 2, line 26, for "of" read "to."
- p. 15, line 3 from bottom, for "of" read "or."
- p. 17, line 5 from bottom, insert word "in" after "falls."
- p. 21, line 6, for "to" read "of."
- p. 39, line 22, for "of" read "in."
- p. 46, line 28, insert word "be" after "to."
- p. 50, line 17, for "1774" read "1794."
- p. 67, line 21, for "our" read "the."
- p. 71, line 20, insert words "and also to retake any part of the United States or its citizens," after word "vessel."
- p. 75, line 34, for "power" read "powder."
- p. 78, line 39, for "power" read "prince."

APPENDIX V :

- p. 1, line 33, for "demurrer" read "demurred."
- p. 2, line 23, insert word "district" after "colony."
- p. 4, lines 25 and 26 for "Lanrodo" read "Laurada."
- p. 25, line 19, for "skipper" read "shipper."
- p. 33, line 7, insert word "me" after "before."

WIBORG CASE :

- p. 34, line 34, for "case" read "cause."
- p. 36, line 31, insert word "jury" after "the."
- p. 81, last line, for "1927" read "1827."
- p. 85, line 31, for "owner" read "men."
- p. 92, line 3, insert word "a" after "of."
- p. 109, line 38, insert word "and" after "arms."
- p. 118, line 12, for "511,503" read "517,573."
- p. 123, line 15, for "games" read "days."
- p. 123, line 34, for "adopted" read "adapted."
- p. 130, line 32, for "the" read "and."
- p. 164, line 23, for "county" read "country."
- p. 169, line 26, for "generally" read "necessarily."
- p. 180, line 11, for "arrange" read "engage."
- p. 180, line 22, for "shall" read "small."

REPORT.

Report to the Spanish Legation with reference to the legal aspect of hostilities committed by vessels specially adapted, in whole or in part, within the United States to warlike uses, and by military expeditions and enterprises carried on from the territory of the United States against the Spanish dominion in Cuba during the present insurrection.

INTRODUCTION.

The undersigned Legal Adviser of the Spanish Legation in the preparation of the following Report, requested by the Minister with reference to the legal aspect of hostilities committed by vessels and military expeditions and enterprises from the territory of the United States, against the Spanish dominion in Cuba, during the present insurrection, has thought it wise to address himself in the first place to a review of the attitude of the Government of the United States in all its branches towards the subject of neutrality, and to that end he has presented, in appendices, proclamations of the Executive from George Washington to Grover Cleveland (1793–1896), the Statutes of the United States from the act of 1794 down to the law now in force (1794–1896), and examples of the action of the Judiciary (1793–1896). The last is introduced by three charges to the Grand Jury, one delivered by the first chief justice of the United States in 1793, before the passage of any neutrality act; the second by Mr. Justice McLean of the Supreme Court of the United States during the rebellion in Canada in 1838; the third by Mr. Justice Campbell of the Supreme Court of the United States in New Orleans, Louisiana, on May 1st, 1855, when the filibustering spirit of the South against the Island of Cuba was at its height.

These charges are followed by judicial decisions in the courts of the United States from 1811 to 1892, and include the proceedings in the Supreme Court of the United States, to bring up before that high tribunal, the case of the Steamship *Itata* by the writ of certiorari. The court declined to grant the writ on the ground that the application was premature, as the cause was then pending and undecided in the Circuit Court of Appeals for the Ninth Circuit; but the Attorney General and the Solicitor General, at that time, earnestly sought, by petition and an able brief, to show that that vessel and her cargo of arms were subject to condemnation under Section 5283 of the Revised Statutes of the United States.

This is followed by some recent judicial proceedings in prosecutions by the United States under the neutrality laws growing out of attempts to aid the present insurrection in Cuba, which last appendix includes a full report of the case of *Wiborg vs. The United*

States, decided by the Supreme Court on the 25th of May, 1896, upholding the one solitary conviction obtained by the United States since the beginning of the present insurrection in Cuba.

The matters covered by the appendices just described, together with such brief comments and explanations as shall be offered in the succeeding pages, sufficiently illustrate not only the attitude of the United States on the subject of neutrality within its own borders in all the branches of the Government, but also its attitude on this subject when appealed to by foreign nations (I).

Next it has been thought proper to show from the case of the United States at Geneva against Great Britain, what the United States expected and required of a neutral nation (II), and then briefly to recall the attitude of Spain toward the United States in 1861 and during the gigantic civil war which raged in the United States till 1865 (III). Following this the experience of the United States during the former insurrection in Cuba is referred to (IV), and finally there is a brief summary of what has taken place during the present insurrection showing the nature of the military expeditions and enterprises set on foot in the United States and the special adaptation of the vessels within the United States to the warlike use of effecting the landing of a hostile body of armed men in Cuba (V).

The circumstances of the United States from 1861 to 1865, and the necessities of the Confederacy during the same period, were widely different from the circumstances surrounding Spain in Cuba to-day and the necessities which have pressed upon the insurgents since the beginning of the present insurrection.

Cuba is only a few leagues from our shores, while the Southern Confederacy was three thousand miles from Great Britain, but the British possession of Nassau was only a few leagues from our coast, while the Government at Madrid is more than three thousand miles away, yet the principles indicated and enforced by the United States against Great Britain as those which should have governed her conduct would seem to be clearly applicable to the duties and obligations of the United States towards Spain in the present instance.

I.

PROCLAMATIONS OF THE PRESIDENT AND ACTS OF CONGRESS.

One of the earliest important questions which confronted the infant Government of the United States was that of neutrality, and throughout its history that question has been justly regarded as of the gravest importance and has received most careful consideration at the hands of American statesmen and jurists, legislators and diplomatists.

President Washington in 1793, a year before the passage of the first American neutrality statute, when the United States had nothing but the law of nations and the sense of their duties as a neutral

to guide them, took the first steps to declare and enforce those duties. The Proclamation of April 22, 1793, was followed by instructions to the collectors of customs to enforce the same, so that of this earliest episode in the history of the United States neutrality, the Case of the United States at Geneva justly boasted, and claimed that—

“A well conceived and extended system of violating the neutrality of the United States, when they were weak and the powers confided to their Executive were untried, was put in operation in April by the representative of one of the powerful nations of Europe, and was suppressed before August without legislation; and also that the United States undertook to make compensation for the injuries resulting from violations that had taken place where they had failed to exert all the means in their power to prevent them.”

President Washington acted not only with reference to the Great European war referred to in his proclamation of April 22, 1793, but also, by his proclamation of March 24, 1794, issued several months before the passage of the first neutrality statute in regard to an armed force said to be assembling in Kentucky for the purpose of invading and plundering a nation at peace with the United States.

On the 5th of June, 1794, the first neutrality statute was passed on the recommendation of President Washington in his annual address of December 3, 1793, in which he used the following language:

“Where individuals shall * * * enter upon military expeditions or enterprises within the jurisdiction of the United States * * * these offences cannot receive too early and close an attention, and require prompt and decisive remedies.”

In the case of the United States at Geneva, it is stated that this act of 1794 was passed by the Congress of the United States *on the application of Great Britain*.

Lord Tenterden, in his Report on the British Neutrality Law, quoted in the case of the United States at Geneva (p. 107), says:

“The act for the amendment of the neutrality laws was introduced by Mr. Canning on the 10th of June, 1819, in an eloquent speech, in the course of which he said: ‘It surely could not be forgotten that in 1793 this country complained of various breaches of neutrality (though much inferior in degree to those now under consideration) committed on the part of subjects of the United States of America. What was the conduct of that nation in consequence? Did it resent the complaint as an infringement of its independence? Did it refuse to take such steps as would insure the

immediate observance of neutrality? Neither. In 1794, immediately after the application from the British Government, the Legislature of the United States passed an act prohibiting, under heavy penalties, the engagement of American citizens in the armies of any belligerent Power. Was that the only instance of the kind? It was but last year that the United States passed an act by which the act of 1794 was confirmed in every respect, again prohibiting the engagement of their citizens in the service of any foreign power, and pointing distinctly to the service of Spain or the South American provinces.’”

President Jefferson, on the 27th of November, 1806, issued his proclamation upon information that sundry persons, citizens of the United States, or residents within the same are conspiring and confederating together to begin and set on foot, &c., a military expedition or enterprise against the dominions of Spain, and warning those who had been seduced into joining said enterprise to withdraw from the same without delay and commanding all persons whomsoever engaged or concerned in the same to cease all further proceedings therein.

It is to be noted that the great father of the Democratic Party and of the strict construction of the Constitution, as the Chief Executive of the United States, *in a matter clearly committed to the exclusive management and control of the Federal Government*, that is to say, our relations with, and duties to, foreign nations, spoke with no uncertain sound, not only the officers of the United States, *but to all the State officials as well*. He uses the following language:

“And I hereby enjoin and require all officers, civil and military, of the United States, *or of any of the States or Territories, and especially all governors* and other executive authorities, all judges, justices, and other officers of the peace, all military officers of the Army or Navy of the United States, and officers of the militia, to vigilant each within his respective department, and according to his functions, in searching out and bringing to condign punishment, all persons engaged or concerned in such enterprise, in seizing and detaining, subject to the dispositions of the law, all vessels, arms, military stores or other means provided or providing for the same, and in general preventing the carrying on such expedition or enterprise, by all the lawful means within their power: And I require all good and faithful citizens and others within the United States, to be aiding and assisting herein, and especially in the discovery, apprehension and bringing to justice all such offenders, in preventing the execution of their unlawful designs, and in giving information against them to the proper authorities.”

Again in 1815, on the first day of September, President Madison issued a proclamation on information that certain persons in the State of Louisiana were conspiring and confederating to begin and set on foot, &c., a military expedition or enterprise against the dominions of Spain. He too required all officers civil and military of the States, as well as of the United States, to be vigilant, and followed almost exactly the language of President Jefferson.

On the 20th of April, 1818, the neutrality act of that date was passed. In the Case of the United States at Geneva it is stated that the statute was enacted at the request of the Portuguese Government. Its provisions are now contained in Title LXVII of the Revised Statutes of the United States, sections 5281 to 5291, inclusive.

In a special message of January 5, 1838, the President, Van Buren, says that—

“Recent events on the southern and northern boundaries show that our laws are insufficient to prevent invasions from the United States of neighboring powers. They give the means of punishment but not of prevention.”

And on the same day the President issued his proclamation warning all citizens who should be concerned in the movement—

“That they will receive no aid or countenance from their government into whatever difficulties they may be thrown by the violation of the laws of their country and the territory of the neighboring and friendly nation.”

In the year 1837 a formidable rebellion against Great Britain had broken out in Canada. Sympathizers with the insurgents beginning to gather on the northern frontier of the United States, Mr. Fox, the British Minister at Washington, “solemnly appealed to the Supreme Government promptly to interpose its sovereign authority for arresting the disturbers” and inquired what means it proposed to employ for that purpose. The President immediately addressed a communication to Congress, calling attention to the defects in the existing statute, and asking that the Executive might be clothed with adequate authority to restrain all persons within the jurisdiction of the United States from the commission of acts of the character complained of.

In the Case of the United States at Geneva occurs the following (pages 32, 33):

“In 1838, when a serious rebellion prevailed in Canada, the Congress of the United States at the request of Great Britain, passed an act authorizing the Government, to exercise exceptional powers to maintain the national neutrality.”

On the 10th of March, 1838, complying for a second time with the request of the British representative, to amend the neutrality laws so as to give more power to the Executive, Congress passed the act of that date.

That act by its first section authorized and required all collectors, naval officers, surveyors, inspectors of customs, marshals and every other officer who might be specially employed for the purpose by the President to seize and detain any vessel, or any arms and munitions of war which may be provided or prepared for any military expedition or enterprise against the territory or dominions of any foreign prince or state, or of any colony, district or people *conterminous with the United States* and with whom they are at peace; and to retain possession of the same until the decision of the President be had thereon or until the same shall be released as thereafter directed.

The second section authorized and required the said officers to seize any vessel or vehicle and all arms and munitions of war about to pass the boundary of the United States for any place within any foreign state or colony *conterminous with the United States where the character of the vessel or vehicle and the quantity of arms and munitions, or their circumstances furnished probable cause to believe that the said vessel or vehicle, arms or munitions, are intended to be employed in carrying on any military expedition or enterprise or operations in the said foreign territory, and to detain the same until the decision of the President be had for the restoration of the same, or until the property be discharged by a judgment of a competent court.*

This act by its terms was to continue in force for the period of two years and no longer.

In Benton's Debates, Volume 13, pp. 638, 641, it appears that the House Bill, as amended, was reported from the Committee on Foreign Relations in the Senate by Mr. Buchanan, who said that—

*"The bill was not satisfactory, but the crisis demanded that we adopt some measure promptly. * * * He hoped that before the two years should elapse some well considered and carefully drawn bill might be adopted on the subject."*

Congress has, however, not since passed any similar act, either permanent or temporary.

During this rebellion the President called upon the Governor of New York and of some other States to issue their proclamations for enforcing the law, and in a second proclamation of President Van Buren, issued on the 21st of November, 1838, he alludes to the *solemn warning heretofore given by the proclamations issued by the Executive of the general government and by some of the governors of the States*, and again warns all those who have engaged in criminal enterprises against Canada that—

"Whatever may be the condition to which they may be reduced, they must not expect the interference of this government, in any

form in their behalf, but will be left reproached by every fellow citizen, to be dealt with according to the policy and justice of that government whose dominions they have, in defiance of the known wishes of their own government and without the shadow of justification or excuse, nefariously invaded."

The President in his second annual message, December 4th, 1838, said :

* * * "A state of feeling on both sides of the frontier had thus been produced, which called for prompt and vigorous interference. If an insurrection existed in Canada the amicable disposition of the United States towards Great Britain as well as their duty to themselves would lead them to maintain a strict neutrality, and to restrain their citizens from all violations of the laws which have been passed for their enforcement. But this Government recognizes a still higher obligation to repress all attempts on the part of its citizens to disturb the peace of a country where order prevails. Depredations by our citizens on nations at peace with the United States, or combinations for committing them, have at all times been regarded by the American Government and people with the greatest abhorrence. Military incursions by our citizens into countries so situated, and the commission of acts of violence on the members thereof, in order to effect a change in its government or under any pretext whatever have been held equally criminal as would be the disturbance of the public peace by similar acts within our own territory."

In 1841 it coming to the knowledge of the general government that secret lodges and clubs on the northern boundary were preparing for an invasion of Canada, President Tyler issued a proclamation on the 25th of September, when Daniel Webster was his Secretary of State, not only assuring the evil minded persons that the laws of the United States would be rigorously executed against their illegal acts, but stating that—

"If in any lawless incursion into Canada they fall into the hands of the British authorities they will not be reclaimed as American citizens, nor any interference made by this government in their behalf."

The proclamation closed by stating that the President expected all intelligent and well disposed members of the community to frown on all these unlawful combinations and illegal proceedings, and to assist the government in maintaining the peace of the government against the mischievous consequences of the acts of these violators of the law.

In 1849, on the 11th of August, President Taylor, being informed

that an armed expedition was about to be fitted out in the United States with an intention to invade the Island of Cuba or some of the provinces of Mexico, declared it to *be the duty of this government to observe the faith of treaties and to prevent any aggressions by our citizens upon the territories of friendly nations; warned all citizens that they would forfeit their claim to the protection of their country, and that they cannot expect the interference of this government in any form on their behalf, no matter to what extremities they may be reduced in consequence of their conduct.*

Again in 1851, President Fillmore declared by his proclamation of April 25th, that there was reason to believe that a military expedition was about to be fitted out in the United States against the Island of Cuba, a colony of Spain with which this country is at peace, and *recited the belief that this expedition was instigated and set on foot chiefly by foreigners who tried to make our shores the scene of their guilty and hostile preparations against a friendly power in flagrant abuse of the hospitality extended to them, and expressly warns the offenders that they will not only be subject to the heavy penalties denounced against such offenses but will forfeit their claims to the protection of this government or any interference on their behalf no matter to what extremities they may be reduced in consequence of their illegal conduct.*

On the 8th of December, 1855, President Pierce, when Mr. Marcy was his Secretary of State, issued his proclamation against a projected expedition against Nicaragua and admonished all persons who might depart from the United States, *either singly or in numbers, organized or unorganized, for any such purpose that they will thereby cease to be entitled to the protection of this Government.*

On the 30th of October, 1858, President Buchanan recited information that a third attempt was being made to set on foot within the United States a military expedition against Nicaragua. *He alluded to the fact that bonds had been issued which could be of no possible value unless the present government of Nicaragua shall be overthrown by force. He also alludes to the pretense that this was not a hostile expedition but a peaceful emigration; that the expedient of this pretense had been successfully resorted to previous to the last expedition, but immediately on the arrival of the so-called emigrants in Nicaragua hostilities had commenced.*

On the 6th of June, 1866, President Johnson, reciting that certain evil disposed persons have within the territory and jurisdiction of the United States begun and set on foot, and provided and prepared, and are still engaged in providing and preparing, means for a military expedition and enterprise, to be carried on from the territories of the United States against the colonies, districts and people of British North America, &c., issued his proclamation *for the purpose of preventing the carrying on the said expedition and enterprise, and to maintain public peace, as well as national honor, and to enforce obedience and respect to the laws of the United States, he warned all*

citizens, and enjoined all officers in the service of the United States to employ all their lawful authority and power *to prevent and defeat said unlawful proceedings.* And he furthermore authorized and empowered Major General Meade, commander of the military division of the Atlantic, to employ the land and naval forces of the United States, and the militia thereof, to arrest and prevent the setting on foot and carrying on the expedition and enterprise aforesaid.

President Grant on the 24th of May, 1870, on information that a military expedition or enterprise against the Dominion of Canada was being set on foot within the United States, warned all persons within the territory or jurisdiction of the United States, against aiding, countenancing, abetting or taking part in such unlawful proceedings, and that *by committing such illegal acts they would forfeit all right to the protection of the Government or to its interference in their behalf to rescue them from the consequences of their own acts,* and all officers were enjoined *to prevent and defeat* the aforesaid unlawful proceedings.

On the 12th of October, 1870, President Grant issued his proclamation with reference to Cuba, where the former insurrection had been in progress nearly two years, in which he recited that divers evil disposed persons had at sundry times within the territory of the United States begun, or set on foot, or provided or prepared the means for, military expeditions or enterprises to be carried on thence against the territories or dominions of powers with whom the United States are at peace, by organizing bodies pretending to have rights of government over portions of the territories or dominions of powers with whom the United States are at peace, or by being or assuming to be members of such bodies, by levying or collecting money for the purpose or for the alleged purpose, of using the same in carrying on military enterprises against said territories and dominions, by enlisting and organizing armed forces to be used against said powers, by fitting out, equipping and arming vessels to transport such organized armed forces to be employed in hostilities against such powers, and there is reason to believe that such persons have violated the laws of the United States by accepting and exercising commissions, etc., and such acts are in violation of the laws of the United States and in disregard of the duties and obligations which all persons residing or being in the territories of the United States owe thereto, and are condemned by all right minded and law abiding citizens; he warns said persons that they will be rigorously prosecuted and upon conviction and sentence to punishment *will not be entitled to expect or receive the clemency of the Executive to save them from the consequences of their guilt.*

International law includes the relations and obligations of nations, one towards another, no less in time of peace than in time of war, and international law and usage provide the means for official information being obtained or given through Ambassadors, Minis-

ters and Consuls as to the state of affairs in a foreign country. And while it could not be insisted that one nation is bound to take notice of the existence of an insurrection in another country, as it is bound to take notice of a recognized state of public war, it cannot be denied that a nation has both the right and duty when satisfied of the fact, either through its own representatives in the foreign country, or through the representatives of the foreign country received by it, of the existence in a neighboring territory, "*of serious civil disturbances accompanied by armed resistance to the authority of the established government*" of such foreign country, to take notice of such a condition of affairs and to give warning to the citizens and inhabitants "*in the discharge of the obligation which one friendly nation owes to another,*" and "*as a measure of precaution*" to prevent the violation of this obligation.

The proclamations heretofore cited herein fully illustrate this principle and its recognition by the United States. And it is further accentuated by the proclamation of President Cleveland issued on the 12th of June, 1895.

It cannot be supposed that the President's proclamation of 1895 was based on common report, and it must be assumed that he was officially satisfied through the Secretary of State that the armed resistance to the lawful Spanish authority in Cuba was a fact, and a fact which bore upon the international obligation of the United States towards Spain, and made it expedient to proclaim it and give warning.

This proclamation is sufficient evidence in every court of the United States of the existence of the insurrection of Cuba. It is a distinct recognition of the obligations of special vigilance imposed upon the United States *in the discharge of its international duty towards Spain*, "*a power with which,*" the proclamation declares, "*the United States are, and desire to remain, on terms of peace and amity.*" Not only the existence of the insurrection thus proclaimed, but the experience of the United States during the preceding insurrection, made this proclamation a fitting measure of precaution, and on its face it declares that it is issued not only "*in recognition of the laws*" of the United States, but also "*in discharge of the obligations of the United States towards a friendly power.*" The admitted experience of the United States during the former insurrection in Cuba doubtless furnished an additional justification for the proclamation and distinctly increased the obligation of warning and vigilance.

The laws of the United States are plainly intended not only to carry out all the obligations imposed upon the United States while occupying a position of neutrality towards belligerents, but also to prevent offenses against friendly powers which are clearly offenses against the law of nations, whether such powers should, or should not, be engaged in war or in attempt to suppress revolt.

It cannot be pretended that the passing of these laws has increased international obligation, but it is clear that the failure to pass such

laws would not diminish international obligation, and indeed that the laws themselves and the administration of them by the municipal authorities of the United States cannot measure or limit the international responsibility of the United States.

The existence of an armed insurrection, solemnly admitted by the President's proclamation increases the obligation which rests upon the United States, even in time of peace, not to knowingly permit injuries by their citizens or inhabitants to a friendly power, and it clearly enlarges the duty of vigilance and the measure of diligence required in preventing such injuries.

Vattel, Book 2 p. 6, Sec. 72.

Phillimore, Volume 1, p. 232.

Calvo, Volume 1, Sec. 355.

Proclamations *ubi supra*.

Case of the United States at Geneva.

The United States in their Case at Geneva put forward the following propositions (pp. 135-6):

"1. That the belligerent may call upon the neutral to enforce its municipal proclamations as well as its municipal laws.

"2. That it is the duty of the neutral when the fact of the intended violation of its sovereignty is disclosed, either through the agency of the representative of the belligerent, or through the vigilance of the neutral, to use all the means in its power to prevent the violation.

"3. That when there is a failure to use all the means in the power of a neutral to prevent a breach of the neutrality of its soil or waters, there is an obligation on the part of the neutral to make compensation for the injury resulting therefrom.

"The United States are aware that some eminent English publicist, writing on the subject of the 'Alabama Claims,' have maintained that the obligation in such case to make compensation would not necessarily follow the proof of the commission of the wrong; but the United States confidently insist that such a result is entirely inconsistent with the course pursued by Great Britain and the United States, during the administration of General Washington, when Great Britain claimed of the United States compensation for losses sustained from the acts of cruisers that had received warlike additions in the ports of the United States, and the United States admitted the justice of the claim, and paid the compensation demanded. The United States also point to the similar compensation made by them to Spain in the treaty of 1819, for similar injuries inflicted on Spanish commerce during the war of the independence of the Spanish American Colonies, as showing the sense of Spain on this point."

II.

THE ATTITUDE OF THE UNITED STATES TOWARDS GREAT BRITAIN,
1861-1865, AND AT GENEVA.

Let us see now the attitude of the United States during our civil war as declared in their Case at Geneva, as well as in contemporaneous correspondence.

They first appealed to the history of the relations between the two countries. They pointed to the efficiency of their own laws and the fidelity with which they had fulfilled their own neutral obligations. They contrasted the conduct of Great Britain with that of Spain during our civil war. They clearly pointed out the military necessities of the Confederacy in carrying on their war, and the steps taken within the British dominions to supply those necessities. The United States were in the field and on the high seas exercising all the rights of war with an efficient blockade. The Confederacy had vast armies in the field continually meeting the armies of the North in gigantic battles. What the Confederacy most needed was a navy, and this necessity they sought to supply within the British dominions, with such success, that they almost swept the flag of the American Commercial Marine from the seas. *The departure of these ships from Great Britain, within which they had been specially adapted, in whole or in part, to the warlike use most important to the Confederacy and most hurtful to the United States was the principal cause of complaint.*

But other considerations were insisted upon by the United States in support of their claims and formed an important part of their Case at Geneva.

The Case of the United States, at page 217, thus alludes to the irritating hostility to the United States and the friendship to the insurgents in the several British communities, reported by their consuls.

“The reports of the diplomatic and consular officers of the United States, made from the British dominions to their Government during the war, which are printed in the volumes which will accompany this case, are full of proof of a constant state of irritating hostility to the United States, and of friendship, to the insurgents in the several communities from which they are written. These despatches are interesting, as showing the facilities which the complicity of the community often, if not always, gave to the schemes of the insurgents for violating the sovereignty of Great Britain. The reports from Liverpool, Nassau, Bermuda, and Melbourne, are especially interesting in this respect, and tend to throw much light on the causes of the differences which are, it is to be hoped, to be forever set at rest by the decision of this Tribunal.”

The United States represented that the port of Nassau was being used, through the negligence or with the connivance of British officials, as a depot of military supplies by the insurgents, and while Lord Russell denied this, the Case of the United States, at page 232, complains that he had not seriously inquired into the complaints of Mr. Adams.

“Earl Russell, on the 8th of January, 1862, in reply to a complaint from Mr. Adams that the Port of Nassau was used as a depot of supplies by the insurgents, officially informed that gentlemen that he had received ‘a report from the receiver general of the port of Nassau stating that no warlike stores have been received at that port, either from Great Britain or elsewhere, and that no munitions of war have been shipped from thence to the Confederate States.’ The United States with confidence assert, in view of what has been already shown, that, had Earl Russell seriously inquired into the complaints of Mr. Adams a state of facts would have been disclosed entirely at variance with this report—one which would have impelled Her Majesty’s Government to suppress what was going on at Nassau.”

It is shown in the Case of the United States that the Confederacy had in fact established in Great Britain, through their agents there, branches of their War, Navy, and Treasury Departments. Speaking of this, at page 229, of the Case, the following language is used:

“The Tribunal of Arbitration will not fail to observe that this was no British commerce, which had existed before the war, and which the neutral might claim the right to continue. It was to a large extent the commerce of the authorities at Richmond, carried on in their own vessels and for their own benefit, and consisted of the export of cotton from the South on account of the so-called Government, and the return of arms, munitions of war, and quartermaster’s stores from Great Britain, for the purpose of destroying the United States—a nation with which Great Britain was at peace. The United States confidently insist that Great Britain, by shielding and encouraging such a commerce, violated its duties as a neutral toward the United States.”

Again at pages 310–311 in some striking paragraphs it is shown how the Confederacy did not and could not get their military supplies in *the ordinary course of commerce*, but originated a commerce for the purpose, under the British flag, which in effect made the British dominions the main, if not the only, base of its military supplies.

“There also was the arsenal of the insurgents, from whence they drew their munitions of war, their arms, and their supplies. It is true that it has been said, and may again be

said, that it was no infraction of the law of nations to furnish such supplies. But, while it is not maintained that belligerents may infringe upon the rights which neutrals have to manufacture and deal in such military supplies *in the ordinary course of commerce*, it is asserted with confidence that a neutral ought not to permit a belligerent to use the neutral's soil as the main, if not the only base of its military supplies, during a long and bloody contest, as the soil of Great Britain was used by the insurgents.

"It may not always be easy to determine what is, and what is not lawful commerce in arms and munitions of war; but the United States conceive that there can be no doubt on which side of the line to place the insurgent operations on British territory. If Huse had been removed from Liverpool, Heyliger from Nassau, and Walker from Bermuda, or if Frazer, Trenholm & Co. had ceased to sell insurgent cotton and to convert it into money for the use of Huse, Heyliger and Walker, the armies of the insurgents must have succumbed. The systematic operations of these persons, carried on openly and under the avowed protection of the British government, made of British territory the 'arsenal' of which Mr. Fish complained in his note of September 25, 1869. Such conduct was, to say the least, wanting in the essentials of good neighborhood, and should be frowned upon by all who desire to so establish the principle of International Law as to secure the peace of the world while protecting the independence of nations.

"It is in vain to say that both parties could have done the same thing. The United States were under no such necessity. If they could not manufacture at home all the supplies they needed, they were enabled to make their purchases abroad openly, and to transport them in the ordinary course of commerce. It was the insurgents who, unable to manufacture at home, were driven to England for their entire military supplies, and who, *finding it impossible to transport those supplies in the ordinary course of commerce, originated a commerce* for the purpose, and covered it under the British flag to Bermuda and Nassau."

The consequences of extending the trade right of neutrals to protect such traffic is thus characterized at page 313:

"To sanction such an extension will be to lay the foundation for international misunderstanding and probable war, whenever a weaker party hereafter may draw upon the resources of a strong neutral, in its efforts to make its strength equal to that of its antagonist."

The Case of the United States, thus introduces the consideration of the municipal law of Great Britain, page 106 :

"It must be borne in mind, when considering the municipal laws of Great Britain, that, whether effective or deficient, they are but machinery to enable the Government to perform the international duties which they recognize, or which may be incumbent upon it from its position in the family of nations. The obligation of a neutral state to prevent the violation of the neutrality of its soil is independent of all interior or local law. The municipal law may and ought to recognize that obligation ; but it can neither create nor destroy it, for it is an obligation resulting directly from International Law, which forbids the use of neutral territory for hostile purpose.

"The local law, indeed, may justly be regarded as evidence as far as it goes, of the nation's estimate of its international duty ; but it is not to be taken as the limit of those obligations in the eye of the law of nations."

Speaking of the British Foreign Enlistment Act of 1819 it uses the following language, pages 107-108 :

"It appears from the whole tenor of the debate which preceded the passage of the act that its sole purpose was to enable the Executive to perform with fidelity the duties towards neutrals which were recognized as imposed upon the Government by the Law of Nations.

"The United States assume that it will be conceded that Great Britain was bound to perform all the duties of a neutral towards the United States which are indicated in this statute. If this obligation should be denied, the United States beg to refer the Tribunal of Arbitration to the declaration of Earl Russell in his communication to Mr. Adams of August 30th, 1865, where he 'lays down with confidence the following proposition': 'That the Foreign Enlistment Act is intended in aid of the duties * * * of a neutral nation.' They also refer to Lord Palmerston's speech in the House of Commons, July 23, 1863, in which he says: 'The American Government have a distinct right to expect that a neutral will enforce its municipal law if it be in their favor.'"

Further on, at page 114, occurs the following statement of the importance and advantage of the eighth section of the United States law of 1818, now section 5287 of the Revised Statutes of the United States as held out to Great Britain before the tribunal at Geneva.

"That Tribunal of Arbitration will also observe that the most important part of the American act is omitted in the

British act, namely, the power conferred by the eighth section on the Executive to take possession of and detain a ship without judicial process, and to use the military and naval forces of the government for that purpose, if necessary. Earl Russell is understood to have determined that the United States should, in no event, have the benefit of such a summary proceeding or of any remedy that would take away the trial by jury."

The United States complained that no provision being made in the law of Great Britain and no steps being taken by her authorities to seize and stop the vessels, they were forced to believe that no complaints would be listened to and no steps taken unless accompanied by statements which could be used as evidence to convict a criminal before an English jury. And they insist that it was, in the judgment of the United States *no adequate excuse* for the Queen's Ministers *to express extreme tenderness of private rights or apprehension of actions for damages in case of any attempt to arrest the ships* (page 256):

"When the United States found that the proof of such aggravated wrong was not deemed worthy of investigation by Her Majesty's Government, because it contained no statements which could be used as evidence to convict a criminal before an English jury, they were most reluctantly forced from that time forward, throughout the struggle, to believe that no complaints would be listened to by Her Majesty's Government which were not accompanied by proof that the persons complained of had brought themselves 'within reach of the criminal law of the United Kingdom;' that the penal provisions of the Foreign Enlistment Act of 1819 were to be taken by Great Britain as the measure of its duty as a neutral; and that no amendment or change in that act was to be made with the assent of the existing Government.

"They earnestly and confidently insist before this Tribunal, that this decision of Her Majesty's Government was in violation of its obligations toward the United States; that it was an abandonment, in advance, not only of that 'due diligence' which is defined in the Treaty of Washington as one of the duties of a neutral, but of any measure of diligence, to restrain the insurgents from using its territory for purposes hostile to the United States.

"Encouraged by the immunity afforded by these several decisions of Her Majesty's Government, the insurgent agents in Great Britain began to extend their operations."

Again at page 303—

"On the present occasion the Queen's ministers seem to have committed the error of assuming that they needed not to look beyond their own local law, enacted for their own domestic

convenience, and, might, under cover of the deficiencies of that law, disregard their sovereign duties toward another sovereign power. *Nor was it, in our judgment, any adequate excuse for the Queen's ministers to profess extreme tenderness of private rights, or apprehension of actions for damages, in case of any attempt to arrest the many ships which, either in England or Scotland, were, with ostentatious publicity, being constructed to cruise against the United States.*

* * * * *

"But although such acts of violation of law were frequent in Great Britain, and susceptible of complete technical proof, notorious, flaunted directly in the face of the world, varnished over, if at all, with the shallowest pretexts of deception, yet no efficient step appears to have been taken by the British Government to enforce the execution of its municipal laws or to vindicate the majesty of its outraged sovereign power. (The Alabama, the Florida, the Georgia and the Shenandoah escaped. The rams were seized, but never condemned; no guilty party was ever punished. Bullock and Prioleau were never interfered with.)

"And the Government of the United States cannot believe that—it would conceive itself wanting in respect for Great Britain to impute—that the Queen's ministers are so much hampered by juridical difficulties that the local administration is thus reduced to such a state of legal impotency as to deprive the Government of capacity to uphold its sovereignty against local wrongdoers or its neutrality as regards other sovereign powers."

The Case at Geneva thus states and applies the rules laid down in the sixth article of the Treaty of Washington, pages 149-158-159.

(Page 149:)

"First, to use due diligence to prevent the fitting out, arming or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to *carry on war* against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, *such vessel having been specially adapted, in whole or in part, within such jurisdiction to warlike use.*

Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties."

* * * * *

(Page 158):

The United States understand that the diligence which is called for by the Rules of the Treaty of Washington is a due diligence; that is, a diligence proportioned to the magnitude of the subject and to the dignity and strength of the power which is to exercise it:—a diligence which shall by the use of active vigilance, and of all the other means in the power of the neutral, through all the stages of the transaction, prevent its soil from being violated; a diligence that shall in like manner deter designing men from committing acts of war upon the soil of the neutral against its will, and thus possibly dragging it into a war which it would avoid; a diligence which prompts the neutral to the most energetic measures to discover any purpose of doing the acts forbidden by its good faith as a neutral, and imposes upon it the obligation, when it receives the knowledge of an intention to commit such acts, to use all the means in its power to prevent it.

No diligence short of this would be 'due;' that is commensurate with the emergency or with the magnitude of the results of negligence. Understanding the words in this sense, the United States find them identical with the measure of duty which Great Britain had previously admitted.

* * * * *

Again on page 306:

"Then if the question of negligence be discussed with frankness, it must be treated in this instance as a case of extreme negligence, which Sir William Jones has taught us to regard as equivalent or approximate to *evil intention*. The question of negligence, therefore, cannot be presented without danger of thought or language disrespectful toward the Queen's ministers; and the President, while purposing, of course, as his sense of duty requires, to sustain the rights of the United States in all their utmost amplitude, yet intends to speak and act in relation to Great Britain in the same spirit of international respect which he expects of her in relation to the United States."

(Page 159:)

"It will also be observed that fitting out, or arming, or equipping each constitutes in itself a complete offence. Therefore a vessel which is fitted out within the neutral's

jurisdiction, with intent to cruise against one of the belligerents, although not equipped or armed therein (and *vice versa*), commits the offence against international law, provided the neutral government had reasonable ground to believe that she *was intended to cruise or carry on war* against such belligerent, and did not use due diligence to prevent it.

"The neutral is required by the second clause of the first Rule of the Treaty to prevent the departure from its jurisdiction of any vessel intended so to cruise or carry on war, such vessel having been *specially adapted, in whole or in part, within such jurisdiction to warlike use*. The Tribunal of Arbitration probably will not have failed to observe that a new term is employed here. In the first clause of the first rule the obligation of the neutral is limited to the prevention of the 'fitting out, arming and equipping' the vessel. In the second clause the language is much broader. A vessel which has been '*specially adapted, in whole or in part, to warlike use*' may not be permitted to depart. The reasons for this change may probably be found in the different interpretations which have been put by the Executive and Judicial Departments of the two Governments upon the words 'fitting out,' and 'equipping,' and in the desire of the negotiators of the treaty to avoid the use of any words that could be deemed equivocal. The United States will endeavor to explain to the tribunal what these differences of interpretation were."

And here again attention is called to the value and efficiency of Section 8 of the United States Act of 1818 (Page 160):

"The eighth section of the United States law of 1818 empowers the President to take possession of and detain vessels which have been 'fitted out and armed' contrary to the provisions of the act. In the year 1869, while there was a state of recognized war between Spain and Peru (although there had been no active hostilities for several years), the Spanish Government made contracts for the construction of thirty steam gun-boats in the port of New York. After some of these boats were launched, but while most of them were on the stocks, and before any had received machinery or had been armed, the Peruvian Minister, on behalf of his Government, represented to the Government of the United States that this was being done in violation of the neutrality of the United States. The President, proceeding under the section of the statute above referred to, took possession of the vessels, and they remained in the custody of the naval forces of the United States until they were released with the consent of the Peruvian Minister at Washington. This was done under the assumption that the construction of a vessel

in neutral territory during time of war, which there is reasonable ground to believe may be used to carry on war against a power with which the neutral is at peace, is an act which ought to be prevented; and that the constructing or building such a vessel was included in the offense of fitting it out. The same interpretation (in substance) has been given to this language by the judicial authorities of the United States."

On pages 211-213 occur the following paragraphs:

"3. That a neutral is bound to enforce its municipal laws and its Executive proclamations; and that a belligerent has the right to ask it to do so; and also the right to ask to have the powers conferred upon the neutral by law increased if found insufficient. (See the precedents in General Washington's administration; Lord Palmerston's speech of July 23, 1863; the opinion of the British Attorney General during the Crimean War; and the United States Special Law of March 10, 1838.)"

* * * * *

"6. That a neutral is bound to use like diligence to prevent the departure from its jurisdiction of *any vessel intended to cruise or carry on war* against any power with which it is at peace; such vessel having been *speciallly adapted, in whole or in part*, within its jurisdiction, *to warlike use.*"

* * * * *

"11. That this obligation is not discharged by a fraudulent attempt of the offending vessel to evade the provisions of a local municipal law. (See The Gran Para, as above; also Bluntschli and other writers on International Law.)"

In the case of the Gran Para, 7 Wheat., p. 471, the Supreme Court used the following language quoted in the United States Case, page 208:

"If this were to be admitted in such a case as this, the laws for the preservation of our neutrality would be completely eluded, so far as this enforcement depends on the restitution of prizes made in violation of them. Vessels completely fitted in our ports for military operations need only sail to a belligerent port, and there, after obtaining a commission, go through the ceremony of discharging and re-enlisting their crew, to become perfectly legitimate cruisers, purified from every taint contracted at the place where all their real force and capacity for annoyance was acquired. This would indeed be a *fraudulent neutrality; disgraceful to our own Government, and of which no nation would be the dupe.* It is impossible for a moment to disguise the facts that the arms and ammunition taken on board the 'Irresistible' at

Baltimore were taken for the purpose of being used on a cruise, and that the men there enlisted, *though engaged in form as for a commercial voyage were not so engaged in fact.* THERE WAS NO COMMERCIAL VOYAGE, AND NO INDIVIDUAL OF THE CREW COULD BELIEVE THERE WAS ONE. Although there might be no express stipulation to serve on board the Irresistible after her reaching the La Plata and obtaining a commission, it must be completely understood that such was to be the fact. FOR WHAT OTHER PURPOSE COULD THEY HAVE UNDERTAKEN THIS VOYAGE? EVERYTHING THEY SAW, EVERYTHING THAT WAS DONE, SPOKE A LANGUAGE TOO PLAIN TO BE MISUNDERSTOOD."

Speaking of the "Alabama" and of her attempts to evade municipal law the United States Case says at page 194:

"Such a vessel has been and is regarded as organized war—more clearly organized war than was that unarmed expedition which left Plymouth in 1828 for Portugal, and was arrested by the British Navy at the same Terceira to which the Alabama fled to receive the arms and ammunition that she failed to take on board at Liverpool either because the purposes of the Foreign Office were surreptitiously revealed, or because the insurgents' agents had reason to believe that they could evade the law by the construction of the vessel on one side of the river Mersey, the collection of the armament on the other side of it, and the putting them together more than three miles out at sea."

Finally the United States on page 459 assert that their position is taken not only in their own interest but for the sake of the future peace of the world.

"They feel that it is their duty to insist before the august body, not only in their own interest, but for the sake of the future peace of the world, that it is not a just performance of the duties of a neutral to permit a belligerent to carry on organized war from its territories against a power with which the neutral is at peace.

"If this Tribunal shall hold that combined operations like those of Bullock, Fraser, Trenholm & Co., Huse, Heyliger and others (which in the judgment of the United States constituted an organized war) are legitimate, their decision will in the opinion of the United States, lay the foundation for endless dissensions and wars.

"If wrongs like those which the United States suffered are held by this tribunal to be no violation of the duties which one nation owes to another, the rules of the Treaty of Washington can have little effective force, and there will be little inducement for nations in future to adopt the peaceful method of arbitration for the settlement of their differences."

III.

THE ATTITUDE OF SPAIN TOWARDS THE UNITED STATES, 1861-1865
AND HOW IT WAS HELD UP TO GREAT BRITAIN AT GENEVA.

The United States in its Case at Geneva, pages 464-465, makes this, amongst other, allusions to Spain's conduct.

"Spain followed France in the track of England but care was taken to avoid, in the Royal Proclamation, the use of the word 'belligerents.' *It has been seen with what fidelity and impartiality the authorities at Cardenas carried out the letter and the spirit of this proclamation, when the Florida arrived there from Nassau, in the summer of 1862.*"

In the diplomatic correspondence of 1861, page 245, we find the following communication from the Chargé de Affaires of the United States at Madrid to Mr. Seward.

"LEGATION OF THE UNITED STATES,
" *Madrid, June 13, 1861.*

* * * * *

"Yesterday in a long and very satisfactory interview with Mr. Calderon, I explained to him the connection of Mr. Jefferson Davis and other leaders in the Southern Rebellion with the attempt made in 1854-'5 by the same parties to provoke a war with Spain for the conquest of Cuba. He was made to see that the former filibustering against Cuba had its origin, like the present rebellion at the South, in the political ambition of our slave owners. They then wished to re-enforce the slave power in the Union by the annexation of new slave states, but having failed in Cuba, in Nicaragua, in Kansas, and lastly in the recent Presidential election, they had at length to turn their arms against the Government of the United States, now passed out of their control.

"Secession was filibustering struck in. * * *

"I mention the example of the court, or appearance of a court, set up by Don Carlos in the northern provinces of Spain not many years since, and asked Mr. Calderon whether that was a government either de jure or de facto; and yet Don Carlos and his rebel army and sympathizers held a large district for a considerable period subject to their duress. * * *

"The result of this interview, I am happy to say, may be regarded by the President as decisive in regard to Spain. Much has been done previously, but it was brought to a termination yesterday.

"The Minister of State not only renewed to me the assurance given to Mr. Preston but amplified it, stating absolutely that

if any commissioners or other negotiators should appear in behalf of the so called Confederate States, the Government would not see them nor recognize them in any capacity; that Spain would have nothing to do with the rebel party in the United States in any sense.

"I might write this to my Government, and say besides that Her Majesty's first secretary of state had promised me that within a few days, as soon as it could be declared, a decree would be issued by this Government prohibiting all Spaniards from taking service on either side, and ordering all the subjects of Spain to maintain complete neutrality in the contest now begun in the United States; that she would prohibit the entrance of southern privateers into any of her ports, peninsular and colonial, and prohibit the furnishing of any supplies to the rebels, whether arms, provisions, coals, ships, or any other merchandise which might aid in their revolt against the Government of the Union. Armed ships, with their prizes would not be permitted to enter her ports. Spanish subjects would be forbidden to accept any letter of marque or other such document, or serve on board of any privateer; and no fitting out of vessels for the purpose of taking part in hostilities against the United States could be permitted, but impeded with vigor and severity."

The Spanish proclamations issued on the 17th day of June, 1861, contain, amongst other provisions (*Ibid.*, p. 248):

"ART. 5. The transportation under the Spanish flag of all articles of commerce is guaranteed except when they are directed to blockaded ports. *The transportation of effects of war is forbidden as well as the carrying of papers, or communications for belligerents. Transgressors shall be responsible for their acts and shall have no right to the protection of my government.*"

□ How the United States appreciated the attitude of Spain when they were engaged in suppressing a rebellion is shown by the following extract from a letter of Mr. Schurz to the Minister of State: Señor Calderon Collantes, Diplomatic Correspondence, 1861, page 254 :

"LEGATION OF THE UNITED STATES,

"*Madrid, July 31, 1861.*

"SIR: Yesterday I received a dispatch from the Secretary of State of the United States, informing me that the President has read with the greatest satisfaction the proclamation of Her Catholic Majesty concerning the unfortunate troubles that have arisen in the United States, and it affords me the sincerest pleasure to express to your excellency the high sense which the President entertains of Her Majesty's prompt decision and friendly action upon this occasion."

In the same letter Mr. Schurz gives notice of a newspaper report of July 27 in regard to the privateer "Sumpter" and her prizes carried into Cuban waters, (Page 255).

"In connection with the fulfilment of this most agreeable duty, I beg leave to call your excellency's attention to the following telegraphic report, contained in the 'London Times' of July 27th :

"Advises have been received from Havana to the 10th instant. The privateering steamer Sumpter had captured eight American ships laden with sugar on the south side of Cuba. One was burnt and the other seven were taken by prize crews into Cienfuegos. One report states that the Captain General of Cuba had released them. Another report asserts that he had detained them in order to refer the matter to Madrid.

"In the latter case I trust her Majesty's government will not hesitate to cause the policy laid down in the royal proclamations to be loyally and promptly carried into effect."

On the very day after the report in the "Times" the prizes were set at liberty.

On the 9th of August, 1861, Mr. Tassara, the Spanish Minister at Washington, wrote to Mr. Seward (Diplomatic Correspondence, 1861, page 255), that according to an official communication of the 28th of July, from the Captain General of the Island of Cuba, the vessels belonging to citizens of the United States, taken into the port of Cienfuegos by the steamer "Sumpter," had been set at liberty.

The following incident, reported (*Ibid.*, p. 272), by Mr. Schurz to Mr. Seward, further illustrates the attitude of the two governments.

* * * * *

"I informed him [the Minister of State] that the London Times of October 16 contained the following telegraphic despatch :

"There are several vessels loading ammunition at Havana for the confederates and asked him whether he knew anything of this.

"Mr. Calderon exclaimed at once with great warmth 'that is impossible; it cannot be true. This would be a violation of the royal decree of the 17th of June and will never be tolerated. General Serrano cannot have permitted this.'"

"I replied that I was happy to hear him express his opinion so unequivocally and emphatically, *for it would be impossible for the Government of the United States to look on quietly while the Cuban ports were used as war depots for the rebels.*

"Mr. Calderon assured me repeatedly that this telegraphic despatch would most certainly turn out to be unfounded and

reiterated in very strong language the assurance of the loyal and friendly feelings of the Spanish government towards the United States and of its firm determination to adhere faithfully to the principles laid down in the royal decree."

Writing to Mr. Schurz, our Minister at Madrid, at page 273 of the Diplomatic Correspondence of 1861, the Assistant Secretary of State used the following language:

* * * * *

"We know our ability to maintain the integrity of the republic and we intend to maintain it. We desire that when it shall have been completely re-established it shall be found that nothing has been done in the meantime by Spain, or by any foreign nation to serve as causes for alienation."

Nothing was done by Spain during our civil war to cause any alienation, but on the contrary her attitude was throughout satisfactory to the United States, and her conduct was held up as an example to Great Britain in the Arbitration at Geneva. In the Case of the United States, at page 350, occurs the following passage:

"From Green Cay the Florida went to Cardenas in the Island of Cuba and attempted to ship a crew there. 'The matter was brought to the notice of the Government, who sent an official to Lieutenant Stribling, commanding during Lieutenant Commanding J. N. Maffitt's illness, with a copy of the (Spanish) Queen's Proclamation and notification to him that the Florida had become liable to seizure.' This efficient conduct of the Spanish authorities made the officers of the Florida feel at once that they were no longer in British waters. She left Cuba, and on the 4th of September she ran through the blockading squadron of Mobile, pretending to be a British man-of-war, and flying British colors."

IV.

THE EXPERIENCE OF THE UNITED STATES DURING THE PREVIOUS INSURRECTION IN CUBA.

For a general view of what was going on in the United States during the previous insurrection, from 1868 to 1874, reference is made to the Foreign Relations for 1875, Part II, pages 1158 to 1213, in which Admiral Polo, the Minister of Spain, and Mr. Fish, the Secretary of State of the United States, each from his own point of view, and differing as to the question of national liability, discuss the known facts with reference to the energy and activity of the Cuban Junta in New York. These communications are freely quoted from in the introductory portions of the "*Descriptive List and Extracts from the Cuban Revolutionary Books showing the operations of the Cuban Revolutionary Junta in the United States, introduced.*"

by extracts from public documents of the United States upon the same subject," filed by the Advocate for Spain before the Spanish and American Mixed Commission sitting under the agreement of February 12th, 1871.

The extracts from the books of the Cuban Junta in New York show that they had in fact an organization which was undertaking to do the work of a War Department, a Navy Department, and a Treasury Department in the city of New York. They received patriotic loans; they received subscriptions for particular expeditions; they received subscriptions for an issue of bonds; they bought arms and ammunition; they bought ships; they began, set on foot, provided and prepared the means for military expeditions or enterprises within the United States to be carried on from thence against the dominions of Spain in Cuba; they kept a general account of expeditions and materials for expeditions; they issued bonds; they corresponded officially with the so-called authorities of the Republic of Cuba in that island, and in the other islands of the West Indies.

The first issue of bonds was on June 1st, 1869, known as the Lemus issue of bonds. The interest on the bonds was payable "*after the ratification of a treaty of peace between the Government of Spain and the Republic of Cuba, or after the overthrow of the Spanish Government in the Island of Cuba, or after the recognition by the Government of the United States of the political independence of the Island of Cuba, and annually thereafter;*" and the right was reserved to pay the principal on any interest days succeeding the first payment of the interest.

The second issue of bonds was described as the loan of December 1st, 1872, under the law of February 12th, 1870, the coupons of which were to begin to be paid one year after the establishment of the republic over the entire island.

In the case of the Naturalized Cubans, Volume 2, entitled the "Cuban Junta in New York," filed by the Advocate for Spain before the Spanish and American Commission sitting under the Agreement of February 12th, 1871, appear not only the extracts from the books of the Cuban Junta with the introduction already noted, but copious extracts from the newspapers published by the Cubans in New York "La Revolucion" and "La Verdad," which were the political organs in the United States of the Government of the so-called Republic of Cuba. Copies of the documents making up this volume will be found in the Legation of Spain, and are on file in the Department of State of the United States. They demonstrate the complete and far reaching character of the organization which existed in the United States, for meeting the necessities of the former insurrection in Cuba, and the publicity which was given to it through the press.

In the course of these documents it appears that a pretence was made of dissolving the original organization called the "Junta Central" by a proclamation dated two days after General Grant's

proclamation of October 12, 1870, and referring specifically thereto, signed by Miguel de Aldama, and published in the Cuban paper "La Revolucion," issued in New York on October 15, 1870.

The extracts from the books and the publication in the "La Revolucion" and "La Verdad" show that organization did not really cease, and that its activity continued for many years thereafter.

Already in January, 1870, Mr. Fish had written to General Sickles, our Minister at Madrid :

"The public interest felt in the United States in the Cuban struggle, has decreased since the flagrant violations of laws by the agents of the insurgents became known and alienated the popular sympathy.

"Had the Cuban Junta expended their money and energy in sending to the insurgents arms and munitions of war, as they might have done consistently with our own statutes and with the law of nations, instead of devoting them to deliberate violation of the laws of the United States; and had they, in lieu of illegally employing persons within the dominion of the United States to go in armed bands to Cuba, proceeded thither unarmed themselves to take personal part in the struggle for independence, it is possible that the result would have been different in Cuba, and it is certain that there would have been a more ardent feeling in the United States in favor of their cause, and more respect for their own sincerity and personal courage."

See Executive Document No. 160, H. R., 41st Congress, Second Session, page 69.

See also Correspondence of the Department of State in regard to Cuba, transmitted to the Senate July 9, 1870.

V.

WHAT HAS TAKEN PLACE IN THE UNITED STATES DURING THE PRESENT INSURRECTION.

It would serve no useful purpose to prolong this Report by going into a detailed statement of all that has been done within the United States during the present insurrection by the Cuban Revolutionary Party. It will suffice for present purposes to allude to the fact that the Revolutionary Party is organized with a President, Secretary, Treasury, &c.; that it has collected large sums of money; that it has active agents in various parts of the United States; that it is in communication with the insurgents in the field in Cuba; that it has acquired the ownership or control of various vessels; that it has purchased large quantities of arms and ammunition and has successfully sent off a number of military expeditions and enterprises from the territory of the United States.

It is impossible to have any commercial communication with the insurgents in the field. The latter hold no port, and have never had permanent possession of any point upon the sea-coast.

To supply them with arms and munitions, it is absolutely necessary for the Cuban sympathizers in the United States "to begin, set on foot, prepare and provide the means for a military expedition or enterprise." They must become the owners of the arms and ammunition before they start, for there can be no commercial consignee in Cuba who can receive them for the insurgents. They must control the vessel which takes them, for its proceedings must be very different from that of a vessel engaged in the commercial and peaceful business of carrying cargo and passengers. The arms must be accompanied by men to land and carry them. These men must themselves be armed in order to safely reach the insurgent forces. In order that the vessel itself may effect a landing she must be provided with a pilot who knows the Cuban waters and the whereabouts and signals of the insurgents, and the vessel must be specially adapted for this warlike use by being provided with boats to effect the landing of the men and arms.

Without most or all of these conditions not a single shipment of arms and munitions has been made from the United States or landed in the Island of Cuba.

There is subjoined a brief résumé with reference to some of the vessels engaged in the service of the insurgents or their agents and some of the expeditions during the present insurrection.

Prior to May 1st, 1895, three vessels, "The Amadis," "The Lagonda," and "Baracoa" took to Cuba arms, ammunition and men. In regard to these vessels there were some attempted proceedings, which, however, produced no result.

After May 1, 1895, the tug "George W. Childs," "The Antoinette," "The Lark," "The Attie," and the "Mallory" were all engaged in the service of the insurgents, but no proceedings were begun against these vessels.

There was also an encampment of a body of men, under the command of the well known insurgent Enrique Collazo on Cape Sable.

THE WILMINGTON, DELAWARE, EXPEDITION.

The men and arms which attempted to start from Wilmington, Delaware, in September, 1895, were taken out into the Delaware River, secretly, in the middle of the night, by a tug belonging to the Wilmington Tug Company, with orders to wait for an outward bound steamer which would blow three whistles, aboard which the men and arms were to be put. This expedition was engineered by the so-called Colonel Emilio Nunez and Gonzalo de Quesada, and there were found in the possession of the men when arrested letters addressed to General Maximo Gomez, to the Marquis of Santa Lucia, and to the "Chief of Communications at Camaguey;" also presents of stylographic pens for General Gomez and others from Gonzalo de Quesada.

It appears that the "Laura" was outward bound that night but owing to some accident to her machinery did not start. Both the "Laura" and her charterers, Hart & Co., have since been active and industrious in sending out expeditions. No proceedings were instituted against the "Laura" or the Wilmington Tug Company, nor were Nunez, Quesada or Hart indicted. The men were prosecuted but acquitted, and the arms were returned and ultimately went to Cuba. (See U. S. *vs.* Pena, Appendix V.)

THE STEAMER COMMODORE.

In the Autumn of 1865 the steamer "Commodore" became an object of suspicion at New London, Connecticut, was watched, and when she went to Wilmington, North Carolina, a cargo of arms and ammunition came by express from the North, whence the "Commodore" had not long before preceded and were shipped on board of her. The munitions of war were expressed from Providence, Rhode Island, a port very near New London, Connecticut, and from New York to Wilmington, the express charges amounting to the enormous sum of nine hundred and forty-two dollars. The "Commodore" had been cleared for Cartagena via Southport, North Carolina, and the captain stated that he did not know what the articles were which were to be shipped, but he intended to clear the cargo as mining implements and machinery. About the same time a considerable body of strange men arrived in Wilmington, but the men must have learned of the proceedings against the vessel and disappeared.

The ship was proceeded against; the cases marked "hardware" and "agricultural implements" were found to be arms and ammunition including a rapid firing gun of the latest and most improved pattern. It was in evidence that this rapid firing gun could be used from the deck of the vessel. The vessel had on board hard coal and soft coal—the soft coal probably to be used in American waters and the hard coal, which makes no smoke, to be used after getting into Spanish waters. In the port of Wilmington the "Commodore" was repaired and refitted and had a sail made. The "Commodore" also carried two boats capable, according to a witness who testified, of landing four or five tons each.

The Judge dismissed the libel refusing to condemn the "Commodore" or the arms. No appeal has been taken by the United States from this decision.

There was no direct evidence that the vessel was fitted to commit hostilities against Cuba, but this was unnecessary, as the United States are at peace with all the world. The Court must take judicial notice of the President's proclamation of the insurrection in Cuba, while the proximity of the island to the pretended destination of the cargo and the false representations of its character, unexplained, in connection with the surrounding circumstances, furnished convincing circumstantial proof.

THE STEAMER LAURADA.

In January, 1896, the captain of the "Laurada," one Hughes, was indicted in the District Court for the Eastern District of South Carolina. The evidence clearly showed that the "Laurada" had not only formed part of and provided the means for a military expedition or an enterprise against Cuba, but had herself, *being thereto specially adapted within the jurisdiction of the United States*, committed hostilities against the island of Cuba, in landing from her decks in boats an armed body of men to make war upon the Spanish authority in Cuba. Hughes, the captain, was acquitted and no proceedings have been taken against the "Laurada" for that expedition, or against the owners of vessels co-operating with her and others concerned.

THE STEAMER LEON.

In and after February, 1896, the steamer "Leon" took out one or more expeditions. Her master and one of the mates have been indicted, though not yet tried, but no proceedings have been taken against the vessel.

THE STEAMER HORSA.

In February, 1896, the steamer "Horsa" took out a military expedition, or enterprise, and the captain, J. H. S. Wiborg, was indicted, tried and convicted in the District Court for the Eastern District of Pennsylvania, and his conviction was affirmed in the Supreme Court of the United States. The circumstances disclosed in the record of that case, of which a complete copy is included in Appendix V, clearly show that Hart, the charterer of the vessel, and others, were subject to indictment, and that the "Horsa" herself was specially adapted by surf-boats, with which she was furnished within the jurisdiction of the United States, to commit hostilities against Cuba, and that she had in fact committed hostilities by landing in said boats a hostile body of armed men on the shores of Cuba to make war on Spain.

No proceedings have been taken against the steamer "Horsa" herself, nor have indictments been found against the owners of the lighter "Stranahan," nor the tug which bore off the men and arms, or against others concerned.

THE STEAMER BERMUDA.

This steamer has been connected with various military enterprises and the commission of hostilities against the Island of Cuba.

On the 22nd of April, 1896, at six in the morning, the steamer "Bermuda," went out of Philadelphia under the command of Captain John O'Brien. *In the Delaware River she took on board a number of surf-boats, and started for Jacksonville, anchoring in front of the Clyde Line of Steamers there at nine at night on the 26th day of*

April. Hardly had she anchored when a tug came up containing arms and munitions, and more life-boats. The so-called Colonel Emilio Nunez, of Philadelphia, publicly known as an agent of the Cuban revolution, went on board, directing all the operations. At five on the following morning she went out of the river, having weighed anchor fit Jacksonville at two in the morning. She went to sea followed by the tug "Kate B. Spencer," which, at six or seven miles to sea, transferred to the Bermuda between ninety and one hundred Cubans.

Captain John O'Brien, who had carried the steamer from Philadelphia, abandoned the boat and was replaced by Captain E. G. Reilly. The change of captains took place on a Sunday at a late hour of the night, and without the intervention of the Consul of Great Britain, whose flag the "Bermuda" carried. It is also stated that Deputy Collector of Customs Hopkins effected the change of captains, without Captain Reilly being provided with the necessary license, thereby violating the navigation laws of the United States.

The Bermuda continued her voyage along the coast, and on the 5th of May, arrived off the coast of Cuba, and when about a mile from Matanzas, began to discharge men, arms and munitions. She was interrupted in this task by a Spanish cruiser and fled precipitately, having disembarked only about forty men, and only about one-half of her cargo of arms and ammunition. The remaining men were carried to Honduras, to the number of fifty-three, and what remained of the arms and ammunition were thrown overboard.

The Bermuda returned to Philadelphia on the 31st of May, 1896, and the fifty-three men were taken from Honduras to Mobile, Alabama, and thence to Tampa, under the charge of the so-called Colonel Leyte Vidal. Later most of these very men, still under the command of the same Colonel Vidal, were embarked in an expedition made up of the "Three Friends," "The Kate B. Spencer," and the "Lillian."

The "Bermuda," as already stated, has been connected with other expeditions, and has been, each time, specially adapted in the United States for the warlike use contemplated, to commit hostilities against a nation at peace with the United States, in violation of Section 5283 of the Revised Statutes.

No proceedings whatever have been taken against the vessel.

THE SCHOONERS S. B. MALLORY, AND ARDELL, AND THE STEAMER
THREE FRIENDS.

On the 29th of February, 1896, the schooner "S. B. Mallory," of Cedar Keys, Florida, sailed from that point with a large cargo of arms and ammunition, amongst which were found principally those which had been theretofore seized by the Government of the United States and afterwards released, and also those contained in a car sent to Cedar Keys from Tampa, Florida.

On the night of the 1st of March, 1896, the schooner "Ardell," of Tampa, Florida, went out from said point with seventy-five men, amongst whom was the so-called General Enrique Collazo. The plan was that the two schooners should meet at a point on the west coast of Florida and go together to Alligator Key, where the steamer "Three Friends" should meet them and transfer cargo.

Information was given to the State Department by the Spanish Minister, and to the United States marshal by the consul of Spain at Tampa. The insurgents got wind of this, the steamer "Three Friends" did not sail from Jacksonville, and while a revenue vessel, which had gone out in pursuit of the schooners, returned on the 4th of March with the "S. B. Mallory" and her cargo of arms and munitions, on the 6th she was released and again went to sea.

In the meantime the steamer "Three Friends" had gone out of Jacksonville at 10 o'clock on the night of the 4th of March, subsequently met the two schooners, "Ardell" and "Mallory," went to Cuba, disembarked the men and part of the cargo, returned with what she could not disembark, and discharged them at Jacksonville, where they were stored. The schooners "Mallory" and "Ardell" also returned.

No proceedings have been taken against the "Three Friends" or the owners of the schooners "Mallory" and "Ardell."

THE THREE FRIENDS, THE KATE B. SPENCER, AND THE LILLIAN.

At five in the morning of the 23d day of May, 1896, the "Three Friends" again went out of the port of Jacksonville, having been loaded with arms and munitions before going out of the St. John's River at a point near Cedar Key. She embarked also under the command of one Couspiere a certain number of men who had been recruited in Tampa, and arrived at Jacksonville the night before on a special train. Emilio Nuñez also directed this expedition. The tug "Kate B. Spencer" carried the men, and Captain Broward, of the "Three Friends," who had gone before to Cuba with an expedition, also carried this one.

The so-called Colonel Emilio Nuñez returned to Jacksonville aboard the tug "Lillian" with eleven insurgents who could not find room on the "Three Friends."

The "Three Friends" carried a third expedition to Cuba at nine o'clock at night on the 17th day of June, 1896. When lying in the St. John's River she took on board the arms and munitions, and also the so-called Colonel Leyte Vidal, and the greater part of the men who failed to effect a landing in the "Bermuda" expedition as well as other men who had arrived at Jacksonville on the steamer "Algonquin" of the Clyde Line a few days before.

No proceedings have been taken against the "Three Friends" under Section 5283.

THE LAURADA AGAIN.

The "Laurada" has been connected with various expeditions. The following is a memorandum as to a case in which her captain gave as an excuse for violating the health laws of the United States, the fact that he had been engaged in violating the neutrality laws of the United States.

Dr. George McCauley, Health Inspector of Mayport, Florida, stated on the 26th of last May that on the morning of the 22nd of the same month, the steamer "Laurada" arrived there to take on provisions. That the said steamer attempted to do this without having had a visit from the health officer, her captain stating that she had not touched on land, but had only disembarked men and munitions on the coast of Cuba. *That the boats which had effected the landing of the arms and men did not return to the steamer, and for that reason she had a clean bill of health.*

The doctor also stated that the captain had ten Cubans on board who had not been able to disembark on account of a Spanish war vessel having interrupted the landing. The captain also said that when the members of the expedition saw the Spanish cruiser they threw the arms in the water, but that there were still on board munitions, dynamite and medicine.

It does not appear that this official of the United States gave any information at the time to his superiors, and he permitted the so-called Colonel Emilio Nuñez to board the "Laurada" various times, who gave her orders to get out as soon as possible, and to throw in the water the war material and dynamite which she had on board.

The "Laurada" went to Charleston and disembarked there the ten Cubans which she had on board, without anybody paying attention as to whether the immigration laws of the United States, or the health laws were observed, and the only penalty inflicted was a fine of one hundred dollars for not having a passenger list.

It is also represented that at the time of the appearance of the Spanish cruiser the landing was conducted very precipitately, and thirty men were drowned. No inquiry into this has been instituted by any of the authorities of the United States.

No proceedings under Section 5283 have been instituted against the vessel.

THE STEAMER "COMMODORE" AGAIN.

The "Commodore" has been in the service of the insurgents for nearly a year. As already stated, she was held for a considerable time at Wilmington, North Carolina, but was finally released. She has carried a good many expeditions.

In the spring the "Commodore," having only a coastwise license, went out of the port of Charleston with arms and ammunition on an expedition to Cuba. These she successfully landed in Cuba,

with men forming a part of the expedition, and, returning to Charleston, claimed that she had sprung a-leak, and had had to throw her cargo overboard. Two members of the crew told of the landing of the expedition.

For making a foreign voyage with only a coastwise license, she was libelled for violation of the navigation laws of the United States. The case was not brought to trial, and the witnesses were not bound over to appear at the trial, and the Cuban Junta has sent off one to Japan and the other to Australia. No proceedings were instituted under Section 5283, and the "Commodore" being simply held for violation of the navigation laws, was released on a bond of forty five hundred dollars, and immediately went on another expedition.

In June, 1896, the "Commodore" went out of Charleston with arms and ammunition, and either by herself, or with the aid of the "Three Friends," successfully landed another expedition in Cuba.

Towards the last of June the steamer "Commodore" arrived at Tampa, Florida, telling the same story of having sprung a-leak and of having to throw her cargo overboard.

On both occasions, and certainly on one, she carried men as well as cargo. Nobody seems to have inquired into the fate of the men, and no proceedings for violation of Section 5283 have been instituted for this hostile expedition.

On the 21st of July, 1896, the "Commodore" was in Charleston harbor loaded with six or eight surf-boats, ready to take arms which were deposited near by, and men who were to come from the coast of Florida.

While this Report is being written it is stated in the public press that one or more revenue cutters are watching the "Commodore;" that she has shipped arms. The authorities, however, appear to have taken no notice of the special adaptation for warlike uses in the Cuban insurrection made by the addition of an unusual number of lifeboats to her equipment, and the vessel has not been seized.

CONCLUSION.

It thus appears that the powers vested in the President by Section Eight of the Act of 1818 (now Section 5287 of the Revised Statutes) have not been effectively used "for the purpose of preventing the carrying on of military expeditions or enterprises" forbidden by Section 5286; that but one conviction of a person concerned in beginning, setting on foot, providing or preparing the means for any such expedition or enterprise has thus far been obtained, and that no condemnation of any vessel or arms under Section 5283 of the Revised Statutes has been sought, except ineffectually in the case of the "Commodore" at Wilmington, North Carolina.

It is by no means clear that the municipal laws of the United States are in themselves insufficient to enable the Government of

the United States to fulfil its international duty towards Spain, but as contended by the United States at Geneva :

“ No nation can, under cover of the deficiencies of its own law, disregard its sovereign duties towards another sovereign power.”

The measure of diligence to which the United States held Great Britain was that the—

“ Diligence should be proportioned to the magnitude of the subject and to the dignity and strength of the power which is to exercise it, a diligence which shall, by the use of active vigilance and of all the other means in the power of the neutral, *through all stages of the transaction*, prevent its soil from being violated ; a diligence that shall, in like manner, deter designing men from committing acts of war upon the soil of the neutral * * * and thus possibly dragging it into a war which it would avoid ; a diligence which prompts the neutral to the most energetic measures to discover any purpose of doing the acts forbidden by its good faith as a neutral, and imposes upon it the obligation when it receives the knowledge of an intention to commit such acts, to use all the means in its power to prevent it.” “ *No diligence short of this*,” said the United States at Geneva, “ *would be ‘ due,’ that is commensurate with the emergency or with the magnitude of the results of negligence.*”

No “ extreme tenderness of private rights or apprehension of action for damages ” in case of any attempt to arrest the Confederate ships was for a moment admitted by the United States as an excuse for Great Britain’s failure.

The insurrection in Cuba is not a gigantic civil war, where the insurgents have established their right to be recognized as belligerents, and where supremacy is sought in pitched battles by contending armies, but it is a guerrilla warfare on the part of the insurgents in which they are aided by the geography and climate of the island in preventing a real trial of their strength by the true arbitrament of war upon the battlefield.

Neither their necessities require, nor their means permit the attempt to establish a navy, but their necessities do require that they be furnished with arms and ammunition, and this they can only obtain, as already shown by means of hostile expeditions and enterprises carried on from the United States against the dominions of Spain in Cuba.

Whatever pretext may be resorted to by the agents of the insurgents in the United States and those concerned with them ; whatever attempts may be made to carry on these military expeditions and enterprises and to commit these hostilities under the guise of peaceful and lawful voyages, the fact remains that from the beginning of

the insurrection the base of supplies for war material of the Cuban insurgents has been in the United States of America, and the supplies have been actually furnished to the insurgents by means of military expeditions and enterprises carried on from thence and designed to effect a hostile landing upon the shores of Cuba, by means of vessels specially adapted within the United States to this warlike use—to commit these hostilities.

To tolerate this state of affairs and these acts is a violation of the duties of neutrality under the law of nations as they have been proclaimed to the rest of the world by the United States. To prevent and punish these acts, which it is submitted are in violation of the statute laws of this country, it is believed that the Federal Government has all the attributes of sovereignty with respect to the subject under discussion and has for their exercise the appropriate agencies which are recognized amongst civilized nations. Nor is it perceived what distinction or difference in principle can excuse the exercise of the diligence commensurate with the existing emergency which in the sight of the world they required and enforced against Great Britain at Geneva.

Respectfully submitted.

CALDERON CARLISLE,
Legal Adviser of the Spanish Legation at Washington.

WASHINGTON, D. C., July 25, 1896.

APPENDIX I.

PROCLAMATIONS.

PROCLAMATIONS BY THE PRESIDENT OF THE UNITED
STATES ENJOINING OBEDIENCE TO AND EN-
FORCEMENT OF THE STATUTES RE-
LATING TO NEUTRALITY.

No. 3. *Enjoining Neutrality as to War against France.*

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

April 22, 1793.

A PROCLAMATION.

Whereas it appears that a state of war exists between Austria, Prussia, Sardinia, Great Britain, and the United Netherlands of the one part, and France on the other, and the duty and interest of the United States require that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent powers:

I have therefore thought fit, by these presents, to declare the disposition of the United States to observe the conduct aforesaid towards those powers respectively; and to exhort and warn the citizens of the United States carefully to avoid all acts and proceedings whatsoever, which may in any manner tend to contravene such disposition.

And I do hereby also make known that whosoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, by committing, aiding, or abetting hostilities against any of the said powers, or by carrying to any of them those articles which are deemed contraband by the modern usage of nations, will not receive the protection of the United States against such punishment or forfeiture; and further, that I have given instructions to those officers, to whom it belongs, to cause prosecutions to be instituted against all persons who shall, within the cognizance of the courts of the United States, violate the law of nations, with respect to the powers at war, or any of them.

In testimony whereof, I have caused the seal of the United States of America to be affixed to these presents, and signed the same with my hand.

Done at the city of Philadelphia, the twenty-second day of April,
one thousand seven hundred and ninety-three, and
[L. s.] of the independence of the United States of America
the seventeenth.

G. WASHINGTON.

By the President:
THOMAS JEFFERSON.

No. 4. *Respecting enlisting Men in Kentucky to invade a neighboring Nation.*

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA :

March 24, 1794.

A PROCLAMATION.

Whereas I have received information that certain persons, in violation of the laws, have presumed, under colour of a foreign authority, to enlist citizens of the United States, and others, within the State of Kentucky, and have there assembled an armed force for the purpose of invading and plundering the territories of a nation at peace with the said United States: And whereas such unwarrantable measures, being contrary to the laws of nations, and to the duties incumbent on every citizen of the United States, tend to disturb the tranquility of the same, and to involve them in the calamities of war: And, whereas it is the duty of the executive to take care that such criminal proceedings should be suppressed, the offenders brought to justice, and all good citizens cautioned against measures likely to prove so pernicious to their country and themselves, should they be seduced into similar infractions of the laws, I have therefore thought proper to issue this proclamation, hereby solemnly warning every person, not authorized by the laws, against enlisting any citizen or citizens of the United States, or levying troops, or assembling any persons within the United States for the purposes aforesaid, or proceeding in any manner to the execution thereof, as they will answer the same at their peril: And I do also admonish and require all citizens to refrain from enlisting, enrolling, or assembling themselves for such unlawful purposes, and from being in anywise concerned, aiding or abetting therein, as they tender their own welfare, inasmuch as all lawful means will be strictly put in execution for securing obedience to the laws, and for punishing such dangerous and daring violations thereof.

And I do, moreover, charge and require all courts, magistrates, and other officers whom it may concern, according to their respective duties, to exert the powers in them severally vested, to prevent and suppress all such unlawful assemblage and proceedings, and to bring to condign punishment those who may have been guilty thereof, as they regard the due authority of government, and the peace and welfare of the United States.

In testimony whereof, I have caused the seal of the United States of America to be affixed to these presents, and signed the same with my hand. Done at the city of Philadelphia, the twenty-fourth day of March, one thousand seven hundred and ninety-four, and of the independence of the United States of America the eighteenth.

[L. s.]

G. WASHINGTON.

By the President:
EDM. RANDOLPH.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas information has been received that sundry persons, citizens of the United States, or residents within the same are conspiring and confederating together to begin and set on foot, provide and prepare the means for a military expedition or enterprize against the dominions of Spain, that for this purpose, they are fitting out and arming vessels in the western waters of the United States, collecting provisions, arms, military stores, and other means, are deceiving and seducing honest and well meaning citizens under various pretences, to engage in their criminal enterprizes, are organizing, officering and arming themselves for the same, contrary to the laws in such cases made and provided: I have therefore thought fit to issue this my PROCLAMATION, warning and enjoining all faithful citizens who have been led without due knowledge or consideration to participate in the said unlawful enterprizes, to withdraw from the same without delay; and commanding all persons whatsoever, engaged or concerned in the same, to cease all further proceedings therein, as they will answer the contrary at their peril; and incur prosecution with all the rigors of the law.— And I hereby enjoin and require all officers, civil and military, of the United States, or of any of the states or territories, and especially all governors, and other executive authorities, all judges, justices and other officers of the peace, all military officers of the Army or Navy of the United States, and officers of the militia, to be vigilant each within his respective department, and according to his functions, in searching out, and bringing to condign punishment, all persons engaged, or concerned in such enterprize, in seizing and detaining, subject to the dispositions of the law, all vessels, arms, military stores or other means provided or providing for the same, and in general preventing the carrying on such expedition or enterprize, by all the lawful means, within their power: And I require all good and faithful citizens, and others within the United States, to be aiding and assisting herein, and especially in the discovery, apprehension, and bringing to justice of all such offenders, in preventing the execution of their unlawful designs, and in giving information against them to the proper authorities.

In testimony whereof I have caused the seal of the United States to be affixed to these presents, and have signed the same with my hand. Given at the city of Washington on the

[SEAL.] twenty-seventh day of November, one thousand eight hundred and six, and in the year of the sovereignty and independence of the United States the thirty-first.

(Signed,) TH: JEFFERSON.

(Signed,) JAMES MADISON,
Secretary of State.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas information has been received that sundry persons citizens of the United States, or residents within the same, and especially within the State of Louisiana, are conspiring together to bring and set on foot, provide and prepare the means for a military expedition or enterprise against the dominions of Spain, with which the United States are happily at peace; that for this purpose they are collecting arms, military stores, provisions, vessels and other means; and deceiving and seducing well-meaning citizens to engage in their unlawful enterprises; are organizing, officering and arming themselves for the same, contrary to the laws in such cases made and provided: I have therefore thought fit to issue this my proclamation, warning and enjoining all faithful citizens, who have been led, without due knowledge or consideration, to participate in said unlawful enterprise to withdraw from the same without delay; and commanding all persons who are engaged or concerned in the same, to cease all further proceedings therein, as they will answer the contrary to their peril. And I hereby enjoin and require all officers, civil and military, of the United States, or of the States or Territories, all judges, justices and other officers of the peace, all military officers of the army or navy of the United States, and officers of the militia, to be vigilant, each within his respective department, and according to his functions, in searching out and bringing to punishment all persons engaged or concerned in such enterprises; in seizing and detaining, subject to the disposition of the law, all arms, military stores, vessels or other means provided or providing for the same; and in general in preventing the carrying on such expedition or enterprise by all the lawful means within their power. And I require all good and faithful citizens, and others within the United States, to be aiding and assisting herein, and especially in the discovery, apprehension and bringing to justice of all such offenders; in preventing the execution of their unlawful combinations or designs; and in giving information against them to the proper authorities.

In testimony whereof I have caused the seal of the United States of America to be affixed to these presents, and signed the same with my hand. Done at the city of Washington, the first day of September, in the year of our Lord one thousand eight hundred and fifteen, and of the independence of the United States of America the fortieth.

JAMES MADISON.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas information having been received of a dangerous excitement on the northern frontier of the United States, in consequence of the civil war begun in Canada, and instructions having been given to the United States officers on the frontier, and applications having been made to the governors of the adjoining States to prevent any unlawful interference on the part of our citizens in the contest unfortunately commenced in the British Provinces: additional information has just been received, that, notwithstanding the proclamations of the governors of the States of New York and Vermont, exhorting their citizens to refrain from any unlawful acts within the territory of the United States; and notwithstanding the presence of the civil officers of the United States, who, by my directions, have visited the scenes of commotion with a view of impressing the citizens with a proper sense of their duty, the excitement, instead of being appeased, is every day increasing in degree; that arms and munitions of war and other supplies, have been procured by the insurgents in the United States—that a military force, consisting in part, at least, of citizens of the United States, had been actually organized, had congregated at Navy Island, and were still in arms under the command of a citizen of the United States, and that they were constantly receiving accessions and aid.

Now, therefore, to the end that the authority of the laws may be maintained, and the faith of treaties observed, I, Martin Van Buren, do most earnestly exhort all citizens of the United States who have thus violated their duties, to return peaceably to their respective homes; and I hereby warn them, that any persons who shall compromise the neutrality of this Government by interfering in any unlawful manner with the affairs of the neighboring British Provinces, will render themselves liable to arrest and punishment under the laws of the United States, which will be rigidly enforced; and also that they will receive no aid or countenance from their government into whatever difficulties they may be thrown by the violation of the laws of their country, and the territory of a neighboring and friendly nation.

Given under my hand at the city of Washington, the fifth day of January, A. D. one thousand eight hundred and thirty-eight, and the sixty-second of the Independence of the United States.

M. VAN BUREN.

By the President:

JOHN FORSYTH, *Secretary of State.*

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas there is too much reason to believe that citizens of the United States, in disregard of the solemn warning heretofore given to them by the proclamations issued by the Executive of the general government, and by some of the governors of the States, have combined to disturb the peace of the dominions of a neighboring and friendly nation, and whereas information has been given to me, derived from official and other sources, that many citizens in different parts of the United States are associated or associating for the same purpose; and whereas disturbances have actually broken out anew in different parts of the two Canadas: and whereas a hostile invasion has been made by citizens of the United States, in conjunction with Canadian and others, who, after forcibly seizing upon the property of their peaceful neighbor for the purpose of effecting their unlawful designs, are now in arms against the authorities of Canada, in perfect disregard of their obligations as American citizens, and of the obligations of the government of their country to foreign nations.

Now, therefore, I have thought it necessary and proper to issue this proclamation, calling upon every citizen of the United States neither to give countenance nor encouragement of any kind to those who have thus forfeited their claim to the protection of their country; upon those misguided or deluded persons who are engaged in them, to abandon projects dangerous to their own country, fatal to those whom they profess a desire to relieve, impracticable of execution without foreign aid, which they cannot rationally expect to obtain, and giving rise to imputations (however unfounded) upon the honor and good faith of their own government; upon every officer, civil or military, and upon every citizen; by the veneration due by all freemen to the laws which they have assisted to enact for their own government; by his regard for the honor and reputation of his country; by his love of order and respect for the sacred code of laws by which national intercourse is regulated; to use every effort in his power to arrest for trial and punishment every offender against the laws providing for the performance of our obligations to the other powers of the world. And I hereby warn all those who have engaged in these criminal enterprises, if persisted in, that, whatever may be the condition to which they may be reduced, they must not expect the interference of this government, in any form in their behalf; but will be left, reproached by every fellow-citizen, to be dealt with according to the policy and justice of that government whose dominions they have, in defiance of the known wishes of their own government, and without the shadow of justification or excuse, nefariously invaded.

Given under my hand at the City of Washington, the twenty-first day of November, in the year of our Lord one thousand eight

hundred and thirty-eight, and the sixty-third of the independence of the United States.

M. VAN BUREN.

By the President:

JOHN FORSYTH, *Secretary of State*.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION

Whereas it has come to the knowledge of the United States that sundry secret lodges, clubs or associations exist on the northern frontier; that the members of these lodges are bound together by secret oaths; that they have collected fire-arms, and other military materials, and secreted them in sundry places; and that it is their purpose to violate the laws of their country, by making military and lawless incursions, when opportunity shall offer, into a territory of a power with which the United States are at peace, and whereas it is known that travelling agitators, from both sides of the line, visit these lodges, and harangue the members in secret meeting, stimulating them to illegal acts; and whereas the same persons are known to levy contributions, on the ignorant and credulous, for their own benefit, thus surporting and enriching themselves by the basest means; and whereas the unlawful intentions of the members of these lodges have already been manifested in an attempt to destroy the lives and property of the inhabitants of Chippewa, in Canada, and the public property of the British government there being:

Now, therefore, I, John Tyler, President of the United States, do issue this my proclamation, admonishing all such evil-minded persons of the condign punishment which is certain to overtake them; assuring them that the laws of the United States will be rigorously executed against their illegal acts; and that if in any lawless incursion into Canada they fall into the hands of the British authorities they will not be reclaimed as American citizens, nor any interference made by this government in their behalf. And I exort all well-meaning but deluded persons who may have joined these lodges, immediately to abandon them, and to have nothing more to do with their secret meetings, or unlawful oaths, as they would avoid serious consequences to themselves. And I expect the intelligent and well-disposed members of the community to frown on all those unlawful combinations, and illegal proceedings, and assist the government in maintaining the peace of the country against the mischievous consequences of the acts of these violators of the law.

Given under my hand, at the city of Washington, the 25th day of September, A. D. 1841, and of the independence of the United States sixty-six.

JOHN TYLER.

By the President:

DANIEL WEBSTER, *Secretary of State*.

BY THE PRESIDENT OF THE UNITED STATES.

A PROCLAMATION

There is reason to believe that an armed expedition is about to be fitted out in the United States, with an intention to invade the island of Cuba, or some of the provinces of Mexico. The best information which the Executive has been able to obtain, points to the island of Cuba as the object of this expedition. It is the duty of this government to observe the faith of treaties, and to prevent any aggression by our citizens upon the territories of friendly nations. I have, therefore, thought it necessary and proper to issue this proclamation, to warn all citizens of the United States, who shall connect themselves with any enterprise so grossly in violation of our laws and our treaty obligations, that they will thereby subject themselves to the heavy penalties denounced against them by our acts of Congress, and will forfeit their claim to the protection of their country. No such person must expect the interference of this government, in any form, on their behalf, no matter to what extremities they may be reduced in consequence of their conduct. An enterprise to invade the territories of a friendly country set on foot and prosecuted within the limits of the United States, is, in the highest degree, criminal, as tending to endanger the peace and compromise the honor of this nation; and, therefore, I exhort all good citizens, as they regard our national reputation, as they respect their own laws and the laws of nations, as they value the blessings of peace and the welfare of their country, to discountenance and prevent, by all lawful means, any such enterprise; and I call upon every officer of this government, civil or military, to use all efforts in his power to arrest, for trial and punishment, every such offender against the laws providing for the performance of our sacred obligations to friendly powers.

Given under my hand the 11th day of August, in the year of our Lord one thousand eight hundred and forty-nine, and the seventy-fourth of the independence of the United States.

Z. TAYLOR.

By the President :

J. M. CLAYTON, *Secretary of State.*

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION

Whereas there is reason to believe that a military expedition is about to be fitted out in the United States with intention to invade the island of Cuba, a colony of Spain, with which this country is at peace; and whereas it is believed that this expedition is instigated and set on foot chiefly by foreigners who dare to make our shores a scene of their guilty and hostile preparations against a

friendly power ; and seek by falsehood and misrepresentation to seduce our own citizens, especially the young and inconsiderate into their wicked schemes—an ungrateful return for the benefit conferred upon them by this people, in permitting them to make our country an asylum from oppression,—and in flagrant abuse of the hospitality thus extended to them.

And whereas such expeditions can only be regarded as adventures for plunder and robbery, and must meet the condemnation of the civilized world, whilst they are derogatory to the character of our country,—in violation of the laws of nations,—and expressly prohibited by our own. Our statutes declare “that if any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide or prepare the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, every person, so offending, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years.

Now, therefore, I have issued this my Proclamation, warning all persons who shall connect themselves with any such enterprise or expedition in violation of our laws and national obligations that they will thereby subject themselves to the heavy penalties denounced against such offenses, and will forfeit their claim to the protection of this government, or any interference in their behalf, no matter to what extremities they may be reduced in consequence of their illegal conduct. And therefore I exhort all good citizens, as they regard our national reputation, as they respect their own laws and the laws of nations, as they value the blessings of peace and the welfare of their country, to discountenance, and, by all lawful means, prevent any such enterprise ; and I call upon every officer of this government, civil or military, to use all efforts in his power, to arrest for trial and punishment every such offender against the laws of the country.

Given under my hand, the twenty-fifth day of April, in the year of our Lord one thousand eight hundred and fifty-one, and the seventy-fifth of the independence of the United States.

MILLARD FILLMORE.

By the President:

W. S. DERRICK, *Acting Secretary of State.*

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION

Whereas information has been received by me that sundry persons, citizens of the United States and others, residents therein, are preparing within the jurisdiction of the same, to enlist, or enter

themselves, or to hire or retain others to participate in military operations within the State of Nicaragua :

Now, therefore, I, Franklin Pierce, President of the United States, do warn all persons against connecting themselves with any such enterprise or undertaking, as being contrary to their duty as good citizens and to the laws of their country, and threatening to the peace of the United States.

I do further admonish all persons who may depart from the United States, either singly or in numbers, organized or unorganized, for any such purpose, that they will thereby cease to be entitled to the protection of this government.

I exhort all good citizens to discountenance and prevent any such disreputable and criminal undertaking as aforesaid, charging all officers, civil and military, having lawful power in the premises, to exercise the same for the purpose of maintaining the authority and enforcing the laws of the United States.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed to these presents.

Done at the city of Washington, the eighth day of December, one thousand eight hundred and fifty-five, and of the independence of the United States the eightieth.

FRANKLIN PIERCE.

By the President :

W. L. MARCY, *Secretary of State.*

No. 52. *Respecting an apprehended Invasion of Nicaragua.*

October 30, 1858.

BY JAMES BUCHANAN, PRESIDENT OF THE UNITED STATES OF AMERICA :

A PROCLAMATION.

Whereas information has reached me from sources which I cannot disregard that certain persons, in violation of the neutrality laws of the United States, are making a third attempt to set on foot a military expedition within their territory against Nicaragua, a foreign State, with which they are at peace. In order to raise money for equipping and maintaining this expedition, persons connected therewith, as I have reason to believe, have issued and sold bonds and other contracts pledging the public lands of Nicaragua and the transit route through its territory as a security for their redemption and fulfilment.

The hostile design of this expedition is rendered manifest by the fact that these bonds and contracts can be of no possible value to their holders, unless the present government of Nicaragua shall be overthrown by force. Besides, the envoy extraordinary and minister plenipotentiary of that government in the United States has

issued a notice, in pursuance of his instructions, dated on the 27th instant, forbidding the citizens or subjects of any nation, except passengers intending to proceed through Nicaragua over the Transit Route from ocean to ocean, to enter its territory without a regular passport, signed by the proper minister or consul-general of the republic resident in the country from whence they shall have departed. Such persons, with this exception, "will be stopped and compelled to return by the same conveyance that took them to the country." From these circumstances, the inference is irresistible that persons engaged in this expedition will leave the United States with hostile purposes against Nicaragua. They cannot, under the guise which they have assumed, that they are peaceful emigrants, conceal their real intentions, and especially when they know, in advance, that their landing will be resisted, and can only be accomplished by an overpowering force. This expedient was successfully resorted to previous to the last expedition, and the vessel in which those composing it were conveyed to Nicaragua, obtained a clearance from the collector of the port of Mobile. Although, after a careful examination, no arms or munitions of war were discovered on board, yet, when they arrived in Nicaragua, they were found to be armed and equipped and immediately commenced hostilities.

The leaders of former illegal expeditions of the same character have openly expressed their intention to renew hostilities against Nicaragua. One of them, who has already been twice expelled from Nicaragua, has invited, through the public newspapers, American citizens to emigrate to that republic, and has designated Mobile as the place of rendezvous and departure, and San Juan and del Norte as the port to which they are bound. This person, who has renounced his allegiance to the United States, and claims to be president of Nicaragua, has given notice to the collector of the port of Mobile that two or three hundred of these emigrants will be prepared to embark from that port about the middle of November.

For these and other good reasons, and for the purpose of saving American citizens who may have been honestly deluded into the belief that they are about to proceed to Nicaragua as peaceful emigrants, if any such there be, from the disastrous consequences to which they will be exposed, I, James Buchanan, President of the United States, have thought it fit to issue this my proclamation enjoining upon all officers of the government, civil and military, in their respective spheres, to be vigilant, active, and faithful in suppressing these illegal enterprises, and in carrying out their standing instructions to that effect, exhorting all good citizens, by their respect for the laws and their regard for the peace and welfare of the country, to aid the efforts of the public authorities in the discharge of their duties.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed to these presents.

Done at the city of Washington, the thirtieth day of October, one
 [L. s.] thousand eight hundred and fifty-eight, and of the
 Independence of the United States the eighty-third.
 JAMES BUCHANAN.

By the President :

LEWIS CASS, *Secretary of State.*

No. 2.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA :

June 6, 1866.

A PROCLAMATION.

Whereas it has become known to me that certain evil-disposed persons have, within the territory and jurisdiction of the United States, begun and set on foot and have provided and prepared, and are still engaged in providing and preparing means for a military expedition and enterprise, which expedition and enterprise is to be carried on from the territory and jurisdiction of the United States against colonies, districts and people of British North America, within the dominions of the United Kingdom of Great Britain and Ireland, with which said colonies, districts and people and Kingdom the United States are at peace :

And whereas the proceedings aforesaid constitute a high misdemeanor, forbidden by the laws of the United States as well as by the law of nations :

Now, therefore, for the purpose of preventing the carrying on of the unlawful expedition and enterprise aforesaid from the territory and jurisdiction of the United States and to maintain the public peace, as well as the national honor, and enforce obedience and respect to the laws of the United States, I, Andrew Johnson, President of the United States, do admonish and warn all good citizens of the United States against taking part in or in anywise aiding, countenancing or abetting said unlawful proceedings; and I do exhort all judges, magistrates, marshals, and officers in the service of the United States to employ all their lawful authority and power to prevent and defeat the aforesaid unlawful proceedings, and to arrest and bring to justice all persons who may be engaged therein.

And pursuant to the act of Congress in such cases made and provided, I do furthermore authorize and empower Major-General George G. Meade, Commander of the Military Division of the Atlantic, to employ the land and naval forces of the United States and the militia thereof, to arrest and prevent the setting on foot and carrying on the expedition and enterprise aforesaid.

In testimony whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington, this sixth day of June, in the year of our Lord one thousand eight hundred and [SEAL] sixty-six, and of the Independence of the United States the ninetieth.

ANDREW JOHNSON.

By the President:

WILLIAM H. SEWARD, *Secretary of State*.

No. 11.

May 24, 1870.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA:

A PROCLAMATION.

Whereas it has come to my knowledge that sundry illegal military enterprises and expeditions are being set on foot within the territory and jurisdiction of the United States, with a view to carry on the same from such territory and jurisdiction against the people and district of the Dominion of Canada, within the dominions of Her Majesty, the Queen of the United Kingdom of Great Britain and Ireland, with whom the United States are at peace:

Now, therefore, I, ULYSSES S. GRANT, President of the United States, do hereby admonish all good citizens of the United States, and all persons within the territory and jurisdiction of the United States, against aiding, countenancing, abetting or taking part in such unlawful proceedings; and I do hereby warn all persons that by committing such illegal acts they will forfeit all right to the protection of the government, or to its interference in their behalf to rescue them from the consequences of their own acts; and I do hereby enjoin all officers in the service of the United States to employ all their lawful authority and power to prevent and defeat the aforesaid unlawful proceedings, and to arrest and bring to justice all persons who may be engaged therein.

In testimony whereof, I have hereunto set my hand, and caused the seal of the United States to be affixed.

Done at the city of Washington, this twenty-fourth day of May, in the year of our Lord one thousand eight hundred [L. s.] and seventy, and of the Independence of the United States the ninety-fourth.

U. S. GRANT.

By the President:

HAMILTON FISH, *Secretary of State*.

No. 12.

August 22, 1870.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA:

A PROCLAMATION.

Whereas a state of war unhappily exists between France, on the one side, and the North German Confederation and its allies, on the other side;

And whereas the United States are on terms of friendship and amity with all the contending powers, and with the persons inhabiting their several dominions;

And whereas great numbers of the citizens of the United States reside within the territories or dominion of each of the said belligerents and carry on commerce, trade, or other business or pursuits therein, protected by the faith of treaties;

And whereas great numbers of the subjects or citizens of each of the said belligerents reside within the territory or jurisdiction of the United States, and carry on commerce, trade, or other business or pursuits therein;

And whereas the laws of the United States, without interfering with the free expression of opinion and sympathy, or with the open manufacture or sale of arms or munitions of war, nevertheless impose upon all persons who may be within their territory and jurisdiction the duty of an impartial neutrality during the existence of the contest:

Now, therefore, I, Ulysses S. Grant, President of the United States, in order to preserve the neutrality of the United States and of their citizens and of persons within their territory and jurisdiction, and to enforce their laws, and in order that all persons, being warned of the general tenor of the laws and treaties of the United States in this behalf, and of the law of nations, may thus be prevented from an unintentional violation of the same, do hereby declare and proclaim that by the act passed on the 20th day of April, A. D. 1818, commonly known as the "neutrality law," the following acts are forbidden to be done, under severe penalties, within the territory and jurisdiction of the United States, to wit:—

1. Accepting and exercising a commission to serve either of the said belligerents by land or by sea against the other belligerent.

2. Enlisting or entering into the service of either of the said belligerents as a soldier, or as a marine, or seaman on board of any vessel of war, letter of marque, or privateer.

3. Hiring or retaining another person to enlist or enter himself in the service of either of the said belligerents as a soldier, or as a marine, or seaman on board of any vessel of war, letter of marque, or privateer.

4. Hiring another person to go beyond the limits or jurisdiction of the United States with intent to be enlisted as aforesaid.

5. Hiring another person to go beyond the limits of the United States with intent to be entered into service as aforesaid.

6. Retaining another person to go beyond the limits of the United States with intent to be enlisted as aforesaid.

7. Retaining another person to go beyond the limits of the United States with intent to be entered into service as aforesaid. (But the said act is not to be construed to extend to a citizen or subject of either belligerent who, being transiently within the United States, shall, on board of any vessel of war, which, at the time of its arrival within the United States, was fitted and equipped as such vessel of war, enlist or enter himself or hire or retain another subject or citizen of the same belligerent, who is transiently within the United States, to enlist or enter himself to serve such belligerent on board such vessel of war, if the United States shall then be at peace with such belligerent.)

8. Fitting out and arming, or attempting to fit out and arm, or procuring to be fitted out and armed, or knowingly being concerned in the furnishing, fitting out, or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of either of the said belligerents.

9. Issuing or delivering a commission within the territory or jurisdiction of the United States for any ship or vessel to the intent that she may be employed as aforesaid.

10. Increasing or augmenting, or procuring to be increased or augmented, or knowingly being concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel, which at the time of her arrival within the United States was a ship of war, cruiser, or armed vessel in the service of either of the said belligerents, or belonging to the subjects or citizens of either, by adding to the number of guns of such vessels, or by changing those on board of her for guns of a larger calibre, or by the addition thereto of any equipment solely applicable to war.

11. Beginning or setting on foot or providing or preparing the means for any military expedition or enterprise to be carried on from the territory or jurisdiction of the United States against the territories or dominions of either of the said belligerents.

And I do further declare and proclaim that by the 19th article of the treaty of amity and commerce, which was concluded between his Majesty the King of Prussia and the United States of America on the 11th day of July, A. D. 1799, which article was revived by the treaty of May 1, A. D. 1828, between the same parties, and is still in force, it was agreed that "the vessels of war, public and private, of both parties, shall carry freely, wheresoever they please, the vessels and effects taken from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs, or any others; nor shall such prizes be arrested, searched, or put under legal process, when they come to and enter the ports of the other party, but may freely be carried

out again at any time by their captors to the places expressed in their commissions, which the commanding officer of such vessel shall be obliged to show."

And I do further declare and proclaim that it has been officially communicated to the government of the United States by the Envoy Extraordinary and Minister Plenipotentiary of the North German Confederation, at Washington, that private property on the high seas will be exempted from seizure by the ships of his Majesty the King of Prussia, without regard to reciprocity.

And I do further declare and proclaim that it has been officially communicated to the government of the United States by the Envoy Extraordinary and Minister Plenipotentiary of His Majesty the Emperor of the French, at Washington, that orders have been given that in the conduct of the war the commanders of the French forces on land and on the seas shall scrupulously observe towards neutral powers the rules of international law, and that they shall strictly adhere to the principles set forth in the declaration of the Congress of Paris of the 16th of April, 1856, that is to say: 1st. That privateering is and remains abolished. 2d. That the neutral flag covers enemy's goods with the exception of contraband of war. 3d. That neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag. 4th. That blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy; and that, although the United States have not adhered to the declaration of 1856, the vessels of His Majesty will not seize enemy's property found on board of a vessel of the United States, provided that property is not contraband of war.

And I do further declare and proclaim that the statutes of the United States and the law of nations alike require that no person, within the territory and jurisdiction of the United States, shall take part, directly or indirectly, in the said war, but shall remain at peace with each of the said belligerents, and shall maintain a strict and impartial neutrality, and that whatever privileges shall be accorded to one belligerent, within the ports of the United States, shall be, in like manner, accorded to the other.

And I do hereby enjoin all the good citizens of the United States, and all persons residing or being within the territory or jurisdiction of the United States, to observe the laws thereof, and to commit no act contrary to the provisions of the said statutes, or in violation of the law of nations in that behalf.

And I do hereby warn all citizens of the United States, and all persons residing or being within their territory or jurisdiction that, while the free and full expression of sympathies in public and private is not restricted by the laws of the United States, military forces in aid of either belligerent cannot lawfully be originated or organized within their jurisdiction; and that while all persons may lawfully, and without restriction by reason of the aforesaid state of war,

manufacture and sell within the United States arms and munitions of war, and other articles ordinarily known as "contraband of war," yet they cannot carry such articles upon the high seas for the use or service of either belligerent, nor can they transport soldiers and officers of either, or attempt to break any blockade which may be lawfully established and maintained during the war, without incurring the risk of hostile capture, and the penalties denounced by the law of nations in that behalf.

And I do hereby give notice that all citizens of the United States and others who may claim the protection of this government, who may misconduct themselves in the premises, will do so at their peril, and that they can in no wise obtain any protection from the government of the United States against the consequences of their misconduct.

In witness whereof I have hereunto set my hand, and caused the seal of the United States to be affixed.

Done at the city of Washington this twenty-second day of August,
 in the year of our Lord one thousand eight hundred
 [SEAL.] and seventy, and of the Independence of the United
 States of America, the ninety-fifth.

U. S. GRANT.

By the President :

HAMILTON FISH, *Secretary of State.*

No. 14.

October 12, 1870.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA :

A PROCLAMATION.

Whereas divers evil disposed persons have, at sundry times, within the territory or jurisdiction of the United States, begun, or set on foot, or provided, or prepared the means for military expeditions or enterprises to be carried on thence against the territories or dominions of powers with whom the United States are at peace, by organizing bodies pretending to have powers of government over portions of the territories or dominions of powers with whom the United States are at peace, or by being or assuming to be members of such bodies, by levying or collecting money for the purpose, or for the alleged purpose of using the same in carrying on military enterprises against such territories or dominions, by enlisting and organizing armed forces to be used against such powers, and by fitting out, equipping, and arming vessels to transport such organized armed forces to be employed in hostilities against such powers ;

And whereas it is alleged, and there is reason to apprehend, that such evil-disposed persons have also, at sundry times, within the

territory and jurisdiction of the United States, violated the laws thereof by accepting and exercising commissions to serve by land or by sea against powers with whom the United States are at peace, by enlisting themselves or other persons to carry on war against such powers, by fitting out and arming vessels with intent that the same shall be employed to cruise or commit hostilities against such powers, or by delivering commissions within the territory or jurisdiction of the United States for such vessels to the intent that they might be employed as aforesaid;

And whereas such acts are in violation of the laws of the United States in such case made and provided, and are done in disregard of the duties and obligations which all persons residing or being within the territory or jurisdiction of the United States owe thereto, and are condemned by all right-minded and law-abiding citizens:

Now, therefore, I, ULYSSES S. GRANT, President of the United States of America, do hereby declare and proclaim that all persons hereafter found within the territory or jurisdiction of the United States committing any of the afore-recited violations of law, or any similar violations of the sovereignty of the United States for which punishment is provided by law, will be rigorously prosecuted therefor, and, upon conviction and sentence to punishment, will not be entitled to expect or receive the clemency of the executive to save them from the consequences of their guilt; and I enjoin upon every officer of this government, civil or military or naval, to use all efforts in his power to arrest, for trial and punishment, every such offender against the laws providing for the performance of our sacred obligations to friendly powers.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington, this twelfth day of October, in the year of our Lord one thousand eight hundred and
 [SEAL] seventy, and of the Independence of the United States of America the ninety-fifth.

U. S. GRANT.

By the President:

HAMILTON FISH, *Secretary of State*.

[Neutrality—Cuba.]

BY THE PRESIDENT OF THE UNITED STATES.

A PROCLAMATION.

Whereas, the Island of Cuba is now the seat of serious civil disturbances accompanied by armed resistance to the authority of the established Government of Spain, a power with which the United States are and desire to remain on terms of peace and amity; and,

Whereas, the laws of the United States prohibit their citizens, as well as all others being within and subject to their jurisdiction, from taking part in such disturbances adversely to such established Government, by accepting or exercising commissions for war-like service against it, by enlistment, or procuring others to enlist for such service, by fitting out or arming or procuring to be fitted out and armed ships of war for such service, by augmenting the force of any ship of war engaged in such service and arriving in a port of the United States, and by setting on foot or providing or preparing the means for military enterprises to be carried on from the United States against the territory of such Government;

Now, Therefore, in recognition of the laws aforesaid and in discharge of the obligations of the United States towards a friendly power, and as a measure of precaution, and to the end that citizens of the United States and all others within their jurisdiction may be deterred from subjecting themselves to legal forfeitures and penalties,

I, Grover Cleveland, President of the United States of America, do hereby admonish all such citizens and other persons to abstain from every violation of the laws hereinbefore referred to, and do hereby warn them that all violations of such laws will be rigorously prosecuted; and I do hereby enjoin upon all officers of the United States charged with the execution of said laws the utmost diligence in preventing violations thereof and in bringing to trial and punishment any offenders against the same.

In testimony whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this twelfth day of June in the year of our Lord one thousand eight hundred and
 [SEAL] ninety-five, and of the Independence of the United States of America the one hundred and nineteenth.

GROVER CLEVELAND.

By the President:

RICHARD OLNEY,

Secretary of State.

APPENDIX II.

LAWS OF THE UNITED STATES.

THE STATUTES OF THE UNITED STATES RELATING TO NEUTRALITY.

June 5, 1794.

An Act in addition to the act for the punishment of certain crimes against the United States.

SECTION 1. Be it enacted and declared by the Senate and House of Representatives of the United States of America in Congress assembled, That if any citizen of the United States shall, within the territory or jurisdiction of the same; accept and exercise a commission to serve a foreign prince or state in war by land or sea, the person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not more than two thousand dollars, and shall be imprisoned not exceeding three years.

SEC. 2. And be it further enacted and declared, That if any person shall within the territory or jurisdiction of the United States enlist or enter himself, or hire or retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince or state as a soldier, or as a marine or seaman on board of any vessel of war, letter of marque or privateer, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding one thousand dollars, and be imprisoned not exceeding three years. *Provided*, That this shall not be construed to extend to any subject or citizen of a foreign prince or state who shall transiently be within the United States and shall on board of any vessel of war, letter of marque or privateer, which at the time of its arrival within the United States was fitted and equipped as such, enlist or enter himself or hire or retain another subject or citizen of the same foreign prince or state, who is transiently within the United States, to enlist or enter himself to serve such prince or state on board such vessel of war, letter of marque or privateer, if the United States shall then be at peace with such prince or state. And provided further, That if any person so enlisted shall within thirty days after such enlistment voluntarily discover upon oath to some justice of the peace or other civil magistrate, the person or persons by whom he was so enlisted, so that he or they may be apprehended and convicted of the said offence; such person so discovering the offender or offenders shall be indemnified from the penalty described by this act.

SEC. 3. And be it further enacted and declared, That if any person shall within any of the ports, harbors, bays, rivers or other waters of the United States, fit out and arm, or attempt to fit out and

arm or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign prince or state to cruise or commit hostilities upon the subjects, citizens or property of another foreign prince or state with whom the United States are at peace, or shall issue or deliver a commission within the territory or jurisdiction of the United States for any ship or vessel to the intent that she may be employed as aforesaid, every such person so offending shall upon conviction be adjudged guilty of a high misdemeanor, and shall be fined and imprisoned at the discretion of the court in which the conviction shall be had, so as the fine to be imposed shall in no case be more than five thousand dollars and the term of imprisonment shall not exceed three years, and every such ship or vessel with her tackle, apparel and furniture together with all materials, arms, ammunition and stores which may have been procured for the building and equipment thereof shall be forfeited, one-half to the use of any person who shall give information of the offense, and the other half to the use of the United States.

SEC. 4. And be it further enacted and declared, That if any person shall within the territory or jurisdiction of the United States increase or augment, or procure to be increased or augmented, or shall knowingly be concerned in increasing or augmenting the force of any ship of war, cruiser or other armed vessel which at the time of her arrival within the United States, was a ship of war, cruiser or armed vessel in the service of a foreign prince or state or belonging to the subjects or citizens of such prince or state the same being at war with another foreign prince or state with whom the United States are at peace, by adding to the number or size of the guns of such vessel prepared for use, or by the addition thereto of any equipment solely applicable to war, every such person so offending shall upon conviction be adjudged guilty of a misdemeanor, and shall be fined and imprisoned at the discretion of the court in which the conviction shall be had, so as that such fine shall not exceed one thousand dollars, nor the term of imprisonment be more than one year.

SEC. 5. And be it further enacted and declared, That if any person shall within the territory or jurisdiction of the United States begin or set on foot or provide or prepare the means for any military expedition or enterprise to be carried on from thence against the territory or dominions of any foreign prince or state with whom the United States are at peace, every such person so offending shall upon conviction be adjudged guilty of a high misdemeanor, and shall suffer fine and imprisonment at the discretion of the court in which the conviction shall be had, so as that such fine shall not exceed three thousand dollars nor the term of imprisonment be more than three years.

SEC. 6. And be it further enacted and declared, That the district courts shall take cognizance of complaints by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof.

SEC. 7. And be it further enacted and declared, That in every case in which a vessel shall be fitted out and armed, or attempted so to be fitted out or armed, or in which the force of any vessel of war, cruiser or other armed vessel, shall be increased or augmented, or in which any military expedition or enterprise shall be begun or set on foot contrary to the prohibitions and provisions of this act; and in every case of the capture of a ship or vessel within the jurisdiction or protection of the United States as above defined, and in every case in which any process issuing out of any court of the United States, shall be disobeyed or resisted by any person or persons having the custody of any vessel of war, cruiser or other armed vessel of any foreign prince or state, or of the subjects or citizens of such prince or state, in every such case it shall be lawful for the President of the United States, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States or of the militia thereof as shall be judged necessary for the purpose of taking possession of, and detaining any such ship or vessel, with her prize or prizes if any, in order to the execution of the prohibitions and penalties of this act, and to the restoring such prize or prizes, in the cases in which restoration shall have been adjudged, and also for the purpose of preventing the carrying on of any such expedition or enterprise from the territories of the United States against the territories or dominions of a foreign prince or state, with whom the United States are at peace.

SEC. 8. And be it further enacted and declared, That it shall be lawful for the President of the United States, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States or of the militia thereof, as shall be necessary to compel any foreign ship or vessel to depart the United States, in all cases in which, by the laws of nations or the treaties of the United States, they ought not to remain within the United States.

SEC. 9. And be it further enacted, That nothing in the foregoing act shall be construed to prevent the prosecution or punishment of treason, or any piracy defined by a treaty or other law of the United States.

SEC. 10. And be it further enacted, That this act shall continue and be in force for and during the term of two years, and from thence to the end of the next session of Congress, and no longer.

APPROVED, June 5, 1794.

Act of Congress of April 20, 1818.

An Act in addition to the "Act for the punishment of certain crimes against the United States," and to repeal the acts therein mentioned.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if any citizen of the United States shall, within the territory or jurisdiction thereof accept and exercise a commission to serve a foreign prince, state, colony, district, or people, in war, by land or by sea, against any prince, state, colony, district or people, with whom the United States are at peace, the person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not more than two thousand dollars, and shall be imprisoned not exceeding three years.

SEC. 2. *And be it further enacted,* That if any person shall, within the territory or jurisdiction of the United States, enlist or enter himself, or hire or retain another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince state, colony, district or people, as a soldier, or as a marine or seaman, on board of any vessel of war, letter of marque, or privateer, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding one thousand dollars, and be imprisoned not exceeding three years: *Provided,* That this act shall not be construed to extend to any subject or citizen of any foreign prince, state, colony, district or people, who shall transiently be within the United States and shall, on board of any vessel of war, letter of marque, or privateer, which at the time of its arrival within the United States, was fitted and equipped as such, enlist or enter himself, or hire or retain another subject of the same foreign prince, state, colony, district, or people, who is transiently within the United States, to enlist or enter himself to serve such foreign prince, state, colony, district, or people, on board such vessel of war, letter of marque, or privateer, if the United States shall then be at peace with such foreign prince, state, colony, district, or people.

SEC. 3. *And be it further enacted,* That if any person shall, within the limits of the United States, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly be concerned in the furnishing, fitting out, or arming, of any ship or vessel with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, or shall issue or deliver a commission within the territory or jurisdiction of the United States, for any ship or vessel, to the intent that she may be employed as aforesaid, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not

more than ten thousand dollars, and imprisoned not more than three years; and every such ship or vessel, with her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited; one half to the use of the informer, and the other half to the use of the United States.

SEC. 4. And be it further enacted, That if any citizen or citizens of the United States shall, without the limits thereof, fit out and arm, or attempt to fit out and arm, or procure to be fitted out and armed, or shall knowingly aid or be concerned in the furnishing, fitting out, or arming, any private ship or vessel of war, or privateer, with intent that such ship or vessel shall be employed to cruise, or commit hostilities, upon the citizens of the United States, or their property, or shall take the command of, or enter on board of any such ship or vessel, for the intent aforesaid, or shall purchase any interest in any such ship or vessel, with a view to share in the profits thereof, such person, so offending, shall be deemed guilty of a high misdemeanor, and fined not more than ten thousand dollars, and imprisoned not more than ten years; and the trial for such offense, if committed without the limits of the United States, shall be in the district in which the offender shall be apprehended or first brought.

SEC. 5. And be it further enacted, That if any persons shall, within the territory or jurisdiction of the United States, increase or augment, or procure to be increased or augmented, or shall knowingly be concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel, which, at the time of her arrival within the United States, was a ship of war, or cruiser, or armed vessel, in the service of any foreign prince or state, or of any colony, district, or people, or belonging to the subjects or citizens of any such prince or state, colony, district, or people, the same being at war with any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, by adding to the number of guns of such vessel, or by changing those on board of her for guns of a larger caliber, or by the addition thereto of any equipment solely applicable to war, every person, so offending, shall be deemed guilty of a high misdemeanor, shall be fined not more than one thousand dollars and be imprisoned not more than one year.

SEC. 6. And be it further enacted, That if any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide or prepare the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are [at] peace, every person, so offending, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years.

SEC. 7. And be it further enacted, That the district courts shall take cognizance of complaints, by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof.

SEC. 8. And be it further enacted, That in every case in which a vessel shall be fitted out and armed, or attempted to be fitted out and armed, or in which the force of any vessel of war, cruiser, or other armed vessel, shall be increased or augmented, or in which any military expedition or enterprise shall be begun or set on foot, contrary to the provisions and prohibitions of this act; and in every case of the capture of a ship or vessel within the jurisdiction or protection of the United States as before defined, and in every case in which any process issuing out of any court of the United States shall be disobeyed or resisted by any person or persons having the custody of any vessel of war, cruiser, or other armed vessel of any foreign prince or state, or of any colony, district, or people, or of any subjects or citizens of any foreign prince or state, or of any colony, district, or people, in every such case it shall be lawful for the President of the United States, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, for the purpose of taking possession of and detaining any such ship or vessel, with her prize or prizes, if any, in order to the execution of the prohibitions and penalties of this act, and to the restoring the prize or prizes in the cases in which restoration shall have been adjudged, and also for the purpose of preventing the carrying on of any such expedition or enterprise from the territories or jurisdiction of the United States against the territories or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace.

SEC. 9. And be further enacted, That it shall be lawful for the President of the United States, or such person as he shall empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, as shall be necessary to compel any foreign ship or vessel to depart the United States in all cases in which, by the laws of nations or the treaties of the United States, they ought not to remain within the United States.

SEC. 10. And be it further enacted, That the owners or consignees of every armed ship or vessel sailing out of the ports of the United States, belonging wholly or in part to citizens thereof, shall enter into bond to the United States, with sufficient sureties, prior to clearing out the same, in double the amount of the value of the vessel and cargo on board, including her armament, that the said ship or vessel shall not be employed by such owners to cruise or commit hostilities against the subjects, citizens, or property, of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace.

SEC. 11. And be it further enacted, That the collectors of the customs be, and they are hereby, respectively, authorized and required to detain any vessel manifestly built for warlike purposes, and about to depart the United States, of which the cargo shall principally consist of arms and munitions of war, when the number of men shipped on board, or other circumstances, shall render it probable that such vessel is intended to be employed by the owner or owners to cruise or commit hostilities upon the subjects, citizens, or property, of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, until the decision of the President be had thereon, or until the owner or owners shall give such bond and security as is required of the owners of armed ships by the preceding section of this act.

SEC. 12. And be it further enacted, That the act passed on the fifth day of June, one thousand seven hundred and ninety-four entitled, "An act in addition to the act for the punishment of certain crimes against the United States," continued in force, for a limited time, by the act of the second of March, one thousand seven hundred and ninety-seven, and perpetuated by the act passed on the twenty-fourth of April, one thousand eight hundred, and the act, passed on the fourteenth day of June, one thousand seven hundred and ninety-seven, entitled, "An act to prevent citizens of the United States from privateering against nations in amity with, or against the citizens of, the United States," and the act, passed the third day of March, one thousand eight hundred and seventeen, entitled, "An act more effectually to preserve the neutral relations of the United States," be, and the same are hereby, severally, repealed: *Provided, nevertheless*, That persons having heretofore offended against any of the acts aforesaid, may be prosecuted, convicted, and punished as if the same were not repealed; and no forfeiture heretofore incurred by a violation of any of the acts aforesaid shall be affected by such repeal.

SEC. 13. And be it further enacted, That nothing in the foregoing act shall be construed to prevent the prosecution or punishment of treason, or any piracy defined by the laws of the United States.

APPROVED, April 20, 1818.

TITLE LXVII.

NEUTRALITY.

SEC. 5281. Every citizen of the United States who, within the territory or jurisdiction thereof, accepts and exercises a commission to serve a foreign prince, state, colony, district, or people, in war by land or sea, against any prince, state, colony, district, or people, with whom the United States are at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not more than two thousand dollars, and imprisoned not more than three years.

SEC. 5282. Every person who, within the territory or jurisdiction of the United States, enlists or enters himself, or hires or retains another person to enlist or enter himself, or to go beyond the limits or jurisdiction of the United States with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people, as a soldier, or as a marine or seaman, on board of any vessel of war, letter of marque, or privateer, shall be deemed guilty of a high misdemeanor, and shall be fined not more than one thousand dollars, and imprisoned not more than three years.

SEC. 5283. Every person who, within the limits of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out, or arming, of any vessel, with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, or who issues or delivers a commission within the territory or jurisdiction of the United States, for any vessel, to the intent that she may be so employed, shall be deemed guilty of a high misdemeanor, and shall be fined not more than ten thousand dollars, and imprisoned not more than three years. And every such vessel, her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited; one-half to the use of the informer, and the other half to the use of the United States.

SEC. 5284. Every citizen of the United States who, without the limits thereof, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly aids or is concerned in furnishing, fitting out, or arming any private vessel of war, or privateer, with intent that such vessel shall be employed to cruise, or commit hostilities, upon the citizens of the United States, or their property, or who takes command of, or enters on board of any such vessel, for such intent, or who purchases any interest in any such vessel, with a view to share in the profits thereof, shall be deemed guilty of a high misdemeanor, and fined not more than ten thousand dollars, and imprisoned not more than ten years. And the trial for such offenses, if committed without the limits of the United States, shall be in the district in which the offender shall be apprehended or first brought.

SEC. 5285. Every person who, within the territory or jurisdiction of the United States, increases or augments, or procures to be increased or augmented, or knowingly is concerned in increasing or augmenting, the force of any ship of war, cruiser or other armed vessel, which, at the time of her arrival within the United States, was a ship of war, or cruiser, or armed vessel, in the service of any foreign

prince or state, or of any colony, district or people, or belonging to the subjects or citizens of any such prince, or state, colony, district, or people, the same being at war with any foreign prince or state, or of any colony, district or people with whom the United States are at peace, by adding to the number of the guns of such vessel, or by changing those on board of her for guns of a larger caliber, or by adding thereto any equipment solely applicable to war, shall be deemed guilty of a high misdemeanor, and shall be fined not more than one thousand dollars and be imprisoned not more than one year.

SEC. 5286. Every person who, within the territory or jurisdiction of the United States, begins, or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years.

SEC. 5287. (The district courts shall take cognizance of all complaints, by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof.) In every case in which the vessel is fitted out and armed, or attempted to be fitted out and armed, or in which the force of any vessel of war, cruiser or other armed vessel is increased or augmented, or in which any military expedition or enterprise is begun or set on foot contrary to the provisions and prohibitions of this Title; and in every case of the capture of a vessel within the jurisdiction or protection of the United States as before defined; and in every case in which any process issuing out of any court of the United States is disobeyed or resisted by any person having the custody of any vessel of war, cruiser, or other armed vessel of any foreign prince or state, or of any colony, district, or people, or of any subjects or citizens of any foreign prince or state, or of any colony, district, or people, it shall be lawful for the President, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, for the purpose of taking possession of and detaining any such vessel, with her prizes, if any, in order to the execution of the prohibitions and penalties of this Title, and to the restoring of such prizes in the cases in which restoration shall be adjudged; and also for the purpose of preventing the carrying on of any such expedition or enterprise from the territories or jurisdiction of the United States against the territories or dominions of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace.

SEC. 5288. It shall be lawful for the President, or such person as he shall empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, as

shall be necessary to compel any foreign vessel to depart the United States in all cases in which, by the laws of nations or the treaties of the United States, she ought not to remain within the United States.

SEC. 5289. The owners or consignees of every armed vessel sailing out of the ports of the United States, belonging wholly or in part to the citizens thereof, shall, before clearing out the same, give bond to the United States, with sufficient sureties, in double the amount of the value of the vessel and cargo on board, including her armament, conditioned that the vessel shall not be employed by such owners to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district or people, with whom the United States are at peace.

SEC. 5290. The several collectors of the customs shall detain any vessel manifestly built for warlike purposes, and about to depart the United States, the cargo of which principally consists of arms and munitions of war, when the number of men shipped on board, or other circumstances, render it probable that such vessel is intended to be employed by the owners to cruise or commit hostilities upon the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace until the decision of the President is had thereon, or until the owner gives such bond and security as is required of the owners of armed vessels by the preceding section.

SEC. 5291. The provisions of this Title shall not be construed to extend to any subject or citizen of any foreign prince, state, colony, district, or people who is transiently within the United States, and [*enlist*] [enlists] or enters himself on board of any vessel of war, letter of marque, or privateer, which at the time of its arrival within the United States was fitted and equipped as such, or hires or retains another subject or citizen of the same foreign prince, state, colony, district, or people who is transiently within the United States, to enlist or enter himself to serve such foreign prince, state, colony, district, or people, on board such vessel of war, letter of marque, or privateer, if the United States shall then be at peace with such foreign prince, state, colony, district, or people. Nor shall they be construed to prevent the prosecution or punishment of treason, or of any piracy defined by the laws of the United States.

ACT OF MARCH 10, 1838.

(V Statutes at Large, p. 212.)

An Act supplementary to an act entitled "An act in addition to the act for the punishment of certain crimes against the United States, and to repeal the acts therein mentioned," approved twentieth of April, eighteen hundred and eighteen.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the several collectors, naval officers, surveyors, inspectors of customs, the marshals, and deputy marshals of the United States, and every other officer who may be specially empowered for the purpose by the President of the United States, shall be, and they are hereby authorized and required to seize and detain any vessel or any arms or munitions of war which may be provided or prepared for any military expedition or enterprise against the territory or dominions of any foreign prince or state, or of any colony, district or people conterminous with the United States, and with whom they are at peace, contrary to the sixth section of the act passed on the twentieth of April, eighteen hundred and eighteen, entitled "An act in addition to the act for the punishment of certain crimes against the United States, and to repeal the acts therein mentioned," and retain possession of the same until the decision of the President be had thereon, or until the same shall be released as hereinafter directed.

SEC. 2. *And be it further enacted,* That the several officers mentioned in the foregoing section shall be, and they are hereby respectively authorized and required to seize any vessel or vehicle, and all arms or munitions of war, about to pass the frontier of the United States for any place within any foreign state, or colony, conterminous with the United States, where the character of the vessel or vehicle, and the quantity of arms and munitions, or other circumstances shall furnish probable cause to believe that the said vessel or vehicle, arms or munitions of war are intended to be employed by the owner or owners thereof, for any other person or persons, with his or their privity, in carrying on any military expedition or operations within the territory or dominions of any foreign prince or state, or any colony, district, or people conterminous with the United States, and with whom the United States are at peace, and detain the same until the decision of the President be had for the restoration of the same, or until such property shall be discharged by the judgment of a court of competent jurisdiction: *Provided,* That nothing in this act contained shall be construed to extend to, or interfere with any trade in arms or munitions of war, conducted in vessels by sea, with any foreign port or place whatsoever, or with any other trade which might have been lawfully carried on before the passage of this act, under the law of nations and the provisions of the act hereby amended.

SEC. 3. *And be it further enacted*, That it shall be the duty of the officer making any seizure under this act, to make application, with due diligence, to the district judge of the district court of the United States within which such seizure may be made, for a warrant to justify the detention of the property so seized ; which warrant shall be granted only on oath or affirmation, showing that there is probable cause to believe that the property so seized is intended to be used in a manner contrary to the provisions of this act ; and if said judge shall refuse to issue such warrant, or application therefor, shall not be made by the officer making such seizure within a reasonable time, not exceeding ten days thereafter, the said property shall forthwith be restored to the owner. But if the said judge shall be satisfied that the seizure was justified under the provisions of this act, and issue his warrant accordingly, then the same shall be detained by the officer so seizing said property, until the President shall order it to be restored to the owner or claimant, or until it shall be discharged in due course of law, on the petition of the claimant, as hereinafter provided.

SEC. 4. *And be it further enacted*, That the owner or claimant of any property seized under this act, may file his petition in the circuit or district court of the United States, in the district where such seizure was made, setting forth the facts in the case ; and thereupon such court shall proceed, with all convenient dispatch, after causing due notice to be given to the district attorney and officer making such seizure, to decide upon the said case, and order restoration of the property, unless it shall appear that the seizure was authorized by this act ; and the circuit and district courts shall have jurisdiction, and are hereby vested with full power and authority, to try and determine all cases which may arise under this act ; and all issues in fact arising under it, shall be decided by a jury, in the manner now provided by law.

SEC. 5. *And be it further enacted*, That whenever the officer making any seizure under this act shall have applied for and obtained a warrant for the detention of the property, or the claimant shall have filed a petition for its restoration, and failed to obtain it, and the property so seized shall have been in the custody of the officer for the term of three calendar months from the date of such seizure, it shall and may be lawful for the claimant or owner to file with the officer a bond to the amount of double the value of the property so seized and detained, with at least two sureties, to be approved by the judge of the circuit or district court, with a condition that the property, when restored, shall not be used or employed by the owner or owners thereof, or by any other person or persons with his or their privity, in carrying on any military expedition or operations within the territory or dominions of any foreign prince or state, or any colony, district, or people, conterminous with the United States, with whom the United States are at peace ; and thereupon the said officer shall restore such property to the owner

or claimant thus giving bond: *Provided*, That such restoration shall not prevent seizure from being again made, in case there may exist fresh cause to apprehend a new violation of any of the provisions of this act.

SEC. 6. *And be it further enacted*, That every person apprehended and committed for trial, for any offense against the act hereby amended, shall, when admitted to bail for his appearance, give such additional security as the judge admitting him to bail may require, not to violate or aid in violating, any of the provisions of the act hereby amended.

SEC. 7. *And be it further enacted*, That whenever the President of the United States shall have reason to believe that the provisions of this act have been, or are likely to be violated, that offenses have been, or are likely to be, committed against the provisions of the act hereby amended, within any judicial district, it shall be lawful for him, in his discretion, to direct the judge, marshal, and district attorney, of such district to attend at such place within the district, and for such time, as he may designate, for the purpose of the more speedy and convenient arrest and examination of persons charged with the violation of the act hereby amended; and it shall be the duty of every such judge or other officer, when any such requisition shall be received by him, to attend at the place and for the time therein designated.

SEC. 8. *And be it further enacted*, That it shall be lawful for the President of the United States, or such person as he may empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary to prevent the violation, and to enforce the due execution, of this act, and the act hereby amended.

SEC. 9. *And be it further enacted*, That this act shall continue in force for the period of two years and no longer.

APPROVED, March 10, 1838.

APPENDIX III.

CHARGES TO GRAND JURIES.

CHARGES TO GRAND JURIES IN CERTAIN JUDICIAL DISTRICTS BY COURTS OF THE UNITED STATES RELATIVE TO ALLEGED INFRACTIONS OF THE NEUTRALITY LAWS.

A charge delivered by the Honorable John Jay, Chief Justice of the United States, to the Grand Jury, impanelled for the Court of the United States, holden for the Middle Circuit in the District of Virginia, at the Capitol in the City of Richmond, on the 22d day of May, 1793. (Wharton's State Trials, p. 49.)

GENTLEMEN OF THE GRAND JURY:

That citizens and nations should use their own as not to injure others, is an ancient and excellent maxim; and is one of those plain precepts of common justice, which it is the interest of all, and the duty of each to obey, and that not only in the use they may make of their property, but also of their liberty, their power and other blessings of every kind.

To restrain men from violating the rights of society and of one another; and impartially to give security and protection to all are among the most important objects of a free government. I say a free government, because in those that are not free, these objects being in certain respects secondary to others are less regarded, and less perfectly provided for. Where the conduct of the citizens is regulated by the laws made by themselves and for their common benefit, and executed by men deriving authority from, and responsible to them, the most regular and exact obedience to those laws is to be expected, required and rendered. By their constitution and laws, the people of the United States have expressed their will, and their will so expressed, must sway and rule supreme in our republic. It is in obedience to their will, and in pursuance of their authority, that this court is now to dispense their justice in this district; and they have made it your duty, gentlemen, to inquire whether any and what infractions of their laws have been committed in this district, or on the seas, by persons in or belonging to it. Proceed, therefore to inquire accordingly, and to present such as either have, or shall come to your knowledge.

That you may perceive more clearly the extent and objects of your inquiries, it may be proper to observe, that the laws of the United States admit of being classed under three heads of descriptions.

- 1st. All treaties made under the authority of the United States.
- 2d. The laws of nations.
- 3dly. The constitution, and statutes of the United States.

Treaties between independent nations, are contracts or bargains which derive all their force and obligation from mutual consent and agreement ; and consequently, when once fairly made and properly concluded, cannot be altered or annulled by one of the parties, without the consent and concurrence of the other. Wide is the difference between treaties and statutes—we may negotiate and make contracts with other nations, but we can neither legislate for them, nor they for us ; we may repeal or alter our statutes, but no nation can have authority to vacate or modify treaties at discretion. Treaties, therefore, necessarily become the supreme law of the land, and so they are very properly declared to be by the sixth article of the constitution.

Whenever doubts and questions arise relative to the validity, operation or construction of treaties, or of any article in them, those doubts and questions must be settled according to the maxims and principles of the laws of nations applicable to the case.

The peace, prosperity, and reputation of the United States, will always greatly depend on their fidelity to their engagements ; and every virtuous citizen (for every citizen is a party to them) will concur in observing and executing them with honor and good faith ; and that, whether they be made with nations respectable and important, or with nations weak and inconsiderable, our obligation to keep our faith results from our having pledged it, and not from the character or description of the state or people, to whom, neither impunity nor the right of retaliation can sanctify perfidy ; for although perfidy may deserve chastisement, yet it can never merit imitation.

2. As to the laws of nations—they are those laws by which nations are bound to regulate their conduct towards each other, both in peace and war. Providence has been pleased to place the United States among the nations of the earth, and therefore, all those duties, as well as rights, which spring from the relation of nation to nation, have devolved upon us. We are with other nations, tenants in common of the sea—it is a highway for all, and all are bound to exercise that common right, and use that common highway in the manner which the laws of nations and treaties require.

On this occasion, it is proper to observe to you, gentlemen, that various circumstances and considerations now unite in urging the people of the United States to be particularly exact and circumspect in observing the obligation of treaties, and the laws of nations, which, as has been already remarked, form a very important part of the laws of our nation. I allude to the facts and injunctions specified in the President's late proclamation ; it is in these words :

“Whereas, it appears that a state of war exists between Austria, Prussia, Sardinia, Great Britain, and the United Netherlands of the one part, and France of the other, and the duty and interest of the United States, require that they should with sincerity and good faith, adopt and pursue a conduct friendly and impartial towards the belligerent powers :

"I have, therefore, thought fit by these presents, to declare the disposition of the United States to observe the conduct aforesaid towards these powers respectively, and to exhort and warn the citizens of the United States, carefully to avoid all acts and proceedings whatsoever, which may in any manner tend to contravene such disposition.

"I do hereby make known that whosoever of the citizens of the United States shall render himself liable to punishment or forfeiture, under the law of nations, by committing, aiding or abetting hostilities against any of the said powers, or by carrying to them those articles which are deemed contraband, by the modern usage of nations, will not receive the protection of the United States against such punishment or forfeiture; and further, that I have given instructions to those officers to whom it belongs, to cause prosecutions to be instituted against all persons who shall within the cognizance of the courts of the United States, violate the law of nations, with respect to the powers at war, or any of them."

By this proclamation authentic and official information is given to the citizens of the United States:—

That war actually exists between the nations mentioned in it.

That they are to observe a conduct friendly and impartial towards the belligerent powers.

That offenders will not be protected, but on the contrary, prosecuted and punished.

The law of nations considers those as neutral nations "who take no part in the war, remaining friends to both parties, and not favoring the arms of one to the detriment of the other;" and it declares that a "nation desirous safely to enjoy the conveniences of neutrality, is in all things to show an exact impartiality between the parties at war; for should he, when under no obligation, favor one to the detriment of the other, he cannot complain of being treated as an adherent and confederate of his enemy, of which no nation would be the dupe if able to resent it."

The proclamation is exactly consistent with and declaratory of the conduct enjoined by the law of nations.

It is worthy of remark that we are at peace with all of these belligerent powers not only negatively in having war with none of them, but also in a more positive and particular sense by treaties with four of them.

By the first article of our treaty with France it is stipulated that "there shall be a firm, inviolable and universal peace, and true and sincere friendship between his Most Christian Majesty, his heirs and successors, and the United States; and between the countries, islands, cities and towns situate under the jurisdiction of his Most Christian Majesty and of the United States, and the people and inhabitants of every degree, without exception of persons or places."

By the first article of our treaty with the United Netherlands, it

is stipulated that "there shall be firm, inviolable and universal peace, and sincere friendship between their High Mightinesses, the Lords and States General of the United Netherlands and the United States of America, and between the subjects and inhabitants of the said parties, and between the countries, islands and places situate under the jurisdiction of the said United Netherlands and the United States of America, their subjects and habitants of every degree, without exception of persons or places."

The definitive treaty of peace with Great Britain begins with great solemnity, in the words following: "In the name of the most holy and undivided Trinity." By the seventh article of this treaty it is stipulated that "there shall be a firm and perpetual peace between his Britanic Majesty and the United States, and between the subjects of the one and the citizens of the other."

By the first article of our treaty with Prussia it is stipulated that "there shall be a firm, inviolable and universal peace and sincere friendship between his Majesty, the King of Prussia, his heirs, successors and subjects on the one part, and the United States of America and their citizens on the other, without exception of persons or places."

By the laws of nations, the United States, as a neutral power, are bound to observe the line of conduct indicated by the proclamation towards all the belligerent powers, and that although we may have no treaties with them. But with respect to France, the United Netherlands, Great Britain and Prussia, the before-mentioned articles in our treaties with them, create additional obligations, to wit: all those obligations which result from express compact and from national faith, mutually, explicitly and solemnly pledged. Surely no engagements can be more wise and virtuous than those whose direct object is to maintain peace and to preserve large portions of the human race from the complicated evils incident to war. While the people of other nations do no violence or injustice to our citizens, it would certainly be criminal and wicked in our citizens, for the sake of plunder, to do violence and injustice to any of them.

The President, therefore, has with great propriety declared "that the duty and interest of the United States require that they should, with sincerity and good faith, adopt and pursue a conduct friendly and impartial towards the belligerent powers."

A celebrated writer on the law of nations very justly observes that "as nature has given to man the right of using force only when it becomes necessary for their defence, and the preservation of their rights, the inference is manifest that since the establishment of political societies, a right so dangerous in its exercise no longer remains with private persons, except in those kind of rencontres, where society cannot protect or defend them.

"In the bosom of society, public authority decides all differences of the citizens, represses violence and checks the impulse of revenge.

It would be too dangerous to give every citizen the liberty of doing himself justice against foreigners, as every individual of a nation might involve it in a war, and how could peace be preserved between nations if it was in the power of every man to disturb it? A right of so great moment, the right of judging whether a nation has a real cause of complaint, whether its case allows of using force, and having recourse to arms; whether prudence admits, and whether the welfare of the State demands it; this right," he says, "can only belong to the body of the nation, or to the sovereign, its representative. It is doubtless one of those without which there can be no salutary government."

It is on these and similar principles that whoever shall render himself liable to punishment or forfeiture, under the law of nations, by committing, aiding or abetting hostilities forbidden by his country, ought to lose the protection of his country against such punishment or forfeiture. But this is not all, it is not sufficient that a nation should only withdraw its protection from such offenders, it ought also to prosecute and punish them. The same writer very justly remarks that "the nation or sovereign ought not to suffer the citizens to do any injury to the subjects of another State, much less to offend the State itself; and that not only because no sovereign ought to permit those who are under his command to violate the precepts of the law of nature which forbids all injuries, but also because nations ought to respect each other, to abstain from all abuse, from all injury, and, in a word, from everything that may be of prejudice to others. If a sovereign, who might keep his subjects within the rules of justice and peace, suffers them to injure a foreign nation, either in its body or its members, he does no less injury to that nation than if he injured them himself. In short, the safety of the State and that of human society require this attention from every sovereign. If you let loose the reins of your subjects against foreign nations these will behave in the same manner to you, and instead of that friendly intercourse which nature has established between all men we should see nothing but one nation robbing another."

The respect which every nation owes to itself imposes a duty on this government to cause all its laws to be respected and obeyed, and that not only by its proper citizens, but also by those strangers who may visit and occasionally reside within its territories. There is no principle better established than that all strangers admitted into a country are, during their residence, subject to the laws of it; and if they violate the laws they are to be punished according to the laws; the design of pains and penalties being to render the laws respected and to maintain order and safety. Hence, it follows that the subjects of belligerent powers are bound, while in this country, to respect the neutrality of it, and are punishable in common with our own citizens for violations of it, within the limits and jurisdiction of the United States.

It is to be remembered, that every nation is, and ought to be, perfectly and absolutely sovereign within its own dominions, to the entire exclusion of all foreign power, interference and jurisdiction, whether attempted by a foreign prince, or by his subjects, with or without his order. "It is a manifest consequence of the liberty and independence of nations, that all of them have a right to be governed as they think proper, and that none have the least authority to interfere in the government of another State. Of all the rights that can belong to a nation, sovereignty is doubtless the most precious, and that which others ought the most scrupulously to respect, if they would not do it an injury."

These are general principles—the laws to which they apply are numerous, and need not be particularized in detail—on the present occasion it will be sufficient to lead your attention to one or two, which will serve to explain the reason and extent of these principles.

"The right of levying soldiers is a sovereign right belonging only to the nation. No foreign power can lawfully exercise it without permission, nor without previous permission can such attempts be otherwise regarded, than as improper interferences with the sovereignty of the country; on this head the law of nations is explicit. It declares,

"That the right of levying soldiers belongs solely to the nation: this important power is the appendage of the sovereign; it makes a part of the supreme prerogative. No person is to enlist soldiers in a foreign country without the permission of the sovereign. They who undertake to enlist soldiers in a foreign country, without the sovereign's permission, or alienate the subjects of another, violate one of the most sacred rights both of the prince and the State; it is a crime punished with great severity in every politic State. Foreign recruiters are hanged immediately, and very justly, as it is not to be presumed that their sovereign ordered them to commit the crime; and if he did, they ought not to have obeyed his order, their sovereign having no right to command what is contrary to the law of nature; usually they who have practiced seduction only are severely punished. But if it appears that they acted by order of the sovereign, such a proceeding in a foreign sovereign is justly considered as an injury, and as a sufficient cause for declaring war against him, unless he condescends to make suitable reparation."

From the observations which have been made, this conclusion appears to result, viz.: That the United States are in a state of neutrality relative to all the powers at war, and that it is their duty, their interest, and their disposition to maintain it; that, therefore, they who commit, aid, or abet hostilities against these powers, or either of them, offend against the laws of the United States and ought to be punished; and consequently that it is your duty, gentlemen, to inquire into and present all such of these offences, as you shall find to have been committed within this district.

What acts amount to committing, or aiding, or abetting hostilities, must be determined by the laws and approved practice of nations, and by the treaties and other laws of the United States relative to such cases. I doubt the expediency of anticipating such cases, and endeavoring now to distinguish acts which do, from others which do not, involve the criminality in question. Singular cases may arise. If, in the course of your inquiries, you should experience difficulties, the Attorney General and, if necessary, the court, will assist you.

Before I dismiss this subject, it cannot be improper to remark, that a state of neutrality leaves us perfectly at liberty to exercise every humane, benevolent, and friendly office towards the powers at war and their subjects; and to continue our usual commerce with them, excepting only those offices and that kind of trade, which may be designed and calculated to give to one party a military preponderancy to the detriment of the others. While we contemplate with anxiety and regret the desolation and distress which a war so general and so inflamed will probably spread over more than one country, let us with becoming gratitude wisely estimate and cherish the peace, liberty, and safety with which the Divine Providence has been pleased so liberally to bless us. By the favor of Heaven, we this day enjoy a degree of prosperity unknown to any other nation in the world—let it be among our enjoyments to render our happiness instrumental in alleviating the misfortunes to which many have already been, and more will yet be, reduced by those national contentions—in a word—let us be faithful to all—kind to all—but let us also be just to ourselves.

The people of the United States have exhibited too many proofs of virtue and intelligence to leave room to doubt their continuing to be so guided by their usual integrity and good sense—but in every nation individuals will always be found who, impelled by avarice or ambition, or by both, will not hesitate to gratify those passions at the expense of the blood and tears even of those who are free from blame. Such men are to be restrained only by fear of punishment. There is, however, another consideration connected with the subject which merits much attention. It is natural in all contests, even for the best men, to take sides, and wish success to one party in preference to the other, our wishes and partialities becoming inflamed by opposition, often cause indiscretions, and lead us to say and do things that had better have been omitted. It is not certain that the irritability of the belligerent powers, combined with some indiscretions on our part, will not involve us in war with some of them.

Prudence directs us to look forward to such an event, and to endeavor not only to avert, but also to be prepared for it. Among our preparations, there can be none more important than union and harmony among ourselves. It is very desirable, that such an event do not find us divided into parties, and particularly into parties in

favor of either foreign nation. Should this be the case, our situation would be dangerous as well as disgraceful. While blessed with union in sentiments and measures relative to national objects, we shall have little to fear; and, therefore, it is sincerely to be wished that our citizens will cheerfully and punctually do their duty to every other nation, but at the same time carefully avoid becoming partisans of any of them.

There is not a history of any nation which does not record the mischiefs they experienced from such parties, and they rarely present us with an instance of a nation being conquered and subjugated, without the detestable aid of its own degenerated or deluded citizens. Nothing is more certain than, that if such parties should arise among the people, they will find their way into every department of the government and carry distrust and discord with them; dark and dreary would then be the prospect before us, and we should in vain look for the speedy return of those happy days when the government was peacefully, wisely and prosperously administered, under the care and auspices of a patriot, in whom the United States have by repeated unanimity in their suffrages, manifested a degree of confidence, no less reputable to their own wisdom and virtue than to his.

But, if neither integrity nor prudence on our part should prove sufficient to shield us from war, we may then meet it with fortitude, and a firm dependence on the Divine protection; whenever it shall become impossible to preserve peace by avoiding offences, it will be our duty to refuse to purchase it by sacrifices and humiliations, unworthy of a free and magnanimous people, either to demand or submit to. The subject presented by the proclamation, appeared to me to be highly interesting, and I thought it useful to treat it with much plainness, as well as latitude. I was aware that I was treading on delicate ground; but as the path of my duty led over it, it was incumbent on me to proceed.

On the third branch of the laws of the United States, viz.: their constitution and statutes, I shall be concise.

Here, also, one great unerring principle, viz.: the will of the people, will take the lead.

The people of the United States, being by the grace and favour of heaven, free, sovereign and independent, had a right to choose the form of national government which they should judge the most conducive to their happiness and safety. They have done so, and have ordained and established the one which is specified in their great and general compact or constitution—a compact deliberately formed, maturely considered, and solemnly adopted and ratified by them. There is not a word in it but what is employed to express the will of the people; and what friend of his country, and the liberties of it, will say that the will of the people is not to

be observed, respected and obeyed? To this general compact every citizen is a party, and, consequently, every citizen is bound by it. To oppose the operation of this constitution, and of the government established by it, would be to violate the sovereignty of the people, and would justly merit reprehension and punishment.

The statutes of the United States, constitutionally made, derive their obligation from the same source, and must bind accordingly. Happy would it be for mankind, and greatly would it promote the cause of liberty and the equal rights of men, if the free and popular government which from time to time may result, should be so constructed, so balanced, so organized and administered, as to be evidently and eminently productive of a higher and more durable degree of happiness than any of the other forms. It is not sufficient to tell men by a bill of rights that they are free, that they have equal rights, and that they are entitled to be protected in them; men will not believe they are really free while they experience oppression—they do not think their title to equal rights realized until they enjoy them; nor will they esteem that a good government, whatever may be its name, which does not uniformly, impartially and effectually protect them.

The more free the people are, the more strong and efficient ought their government to be, and for this plain reason, that it is a more arduous task to make and keep up the fences of law about twenty rights than about five or six; and because it is more difficult to fence against and restrain men who are unfettered, than men who are in yokes and chains. Being a free people, we are governed only by laws, and those of our own making—these laws are rules for regulating the conduct of individuals, and are established according to, and in pursuance of that contract which each citizen has made with the rest, and all with each. He is not a good citizen who violates his contract with society; and when society execute their laws, they do no more than what is necessary to constrain individuals to perform that contract, on the due operation and observance of which the common good and welfare of the community depend; for the object of it is to secure to every man what belongs to him, as a member of the nation; and by increasing the common stock of property, to augment the value of his share in it. Most essentially, therefore, it is the duty and interest of us all, that the laws be observed and irresistibly executed.

I might now proceed to call your attention to certain statutes which merit particular attention, and it would not be difficult to place in points of view, in which their importance to the public would appear in strong lights—but having already detained you so long, and these subjects not being new to you, I will forbear enlarging on them on the present occasion.

The manner in which you are to fulfil the duties now incumbent on you, is specified in the oath you have taken.

The experience of ages commands the institution of grand juries; it has merited and received constant encomiums, and I trust, gentlemen, that your conduct on this and similar occasions, will afford new proofs of its utility and excellence.

A charge delivered by the Honorable JOHN MCLEAN, Associate Justice of the Supreme Court of the United States, to the Grand Jury impanelled for the Circuit Court of the United States for the Seventh Circuit, at December Term, 1838. (2 McLean's Circuit Court Reports, p. 1.)

Your particular and most serious attention is requested to the provisions of an act entitled "an act to punish certain offenses against the United States."

By the first section of this act, it is declared, "that if any citizen of the United States shall, within the territory or jurisdiction thereof, accept and exercise a commission to serve a foreign prince, state, colony, district, or people, with whom the United States are at peace, he shall be deemed guilty of a high misdemeanor, and be fined not more than two thousand dollars, and imprisoned not exceeding three years."

And in the sixth section, it is provided, "that if any person shall, within the territory or jurisdiction of the United States, begin to set on foot, or provide or prepare the means for, any military expedition or enterprise to be carried on from thence, against the territory or dominion of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, every person, so offending, shall be fined not exceeding three thousand dollars, and imprisoned not more than three years."

There are many other acts prohibited by this law, which relate to foreign powers, and which may be presented for your examination; but the above sections are considered the most important.

The offense in the first section consists in "accepting and exercising a commission," to carry on war against any people or state with whom we are at peace.

The commission may be conferred by any district of country, or association of people, whose right to confer it shall be recognized by the person appointed. And it is immaterial whether the commission has been conferred by the popular voice, or by the representatives of such district, or association of people.

It must have been accepted and exercised, to come within your jurisdiction, within this State, by a citizen of the United States. Some overt act, under the commission, must be done; such as raising men for the enterprise, collecting provisions, munitions of war, or any other act which shows an exercise of the authority which the commission is supposed to confer.

Under the 9th section, the offence consists in beginning to set on foot, or providing or preparing the means for any military expedition or enterprise, to be carried on from the United States, against the territory or dominions of a foreign people or state.

To "begin to set on foot a military expedition," is not actually setting on foot such expedition; but it is making such preparation for it, as shall show the intent to set it on foot.

To "provide or prepare the means for any military expedition or enterprise," within the law, such preparation must be made as shall aid the expedition. The contribution of money, clothing for the troops, provisions, arms, or any other contribution which shall tend to forward the expedition, or add to the comfort or maintenance of those who are engaged in it, is considered to be in violation of the law.

The acts must be done under such circumstances as to show the criminal intent, unless such intent shall be avowed. And it is hardly to be expected, that when an individual is about to violate the laws of his country, he will openly declare his intention to do so.

Where the act and the attendant circumstances show the criminal intent, no subterfuge or motives avowed, should screen the citizen from the consequences of such an act.

To come within your cognizance, every violation of this law must have been committed within this State; and by a citizen of the United States.

These provisions are highly important, and they should be faithfully executed against all who violate them.

Great excitement is known to exist, at this time, in Canada, from certain hostile movements contemplated by citizens of this country, in conjunction with the disaffected subjects of that country. It is said, on high authority, that associations of citizens of the United States have been formed, along the whole extent of our northern boundary, with the view, at a fixed time, to make a descent upon Canada. That these associations embrace an immense number of individuals, who are known to each other by certain signs and passwords. That they are actively engaged in collecting the materials of war, and raising men. That their military officers are appointed; and that, in anticipation of success, they have appointed civil officers.

I cannot but think these accounts have been greatly exaggerated, and that they may have caused an unnecessary degree of alarm. But that there is ground for apprehension of danger, no one can doubt.

During the past winter, many of our citizens were engaged in this lawless enterprise. This is proved by the records of our own courts, and the courts of Canada, and by well authenticated accounts which have been published. Indeed, it is notorious that organized bodies of men, though, perhaps, not bearing arms, were marched through the northern part of this and other states, on our north boundary,

with the known intention of invading Canada, who were permitted to pass without molestation. And, it is believed that, in some instances, they were encouraged in their enterprise by contributions of money, provisions, and other necessities.

This state of things is deeply to be lamented. When our citizens, generally, shall cease to respect the laws, and the high duties they owe their own government, there is but a slender ground of hope that our institutions can long be maintained.

An obedience to the laws is the first duty of every citizen. It lays at the foundation of our noble political structure; and when this great principle shall be departed from, with the public sanction, the moral influence of our government must terminate.

If there be any one line of policy in which all political parties agree, it is, that we should keep aloof from the agitations of other governments. That we shall not intermingle our national concerns with theirs. And much more, that our citizens shall abstain from acts which lead the subjects of other governments to violence and bloodshed.

We have a striking instance of the wisdom of this policy in the early history of our government.

During the administration of our first President the French Revolution burst forth and astonished the civilized world. All Europe combined in arms against Republican France. That France which had mingled her arms and her blood with ours in our struggle for independence.

That this country should deeply sympathize with so noble, brave and generous an ally, in such a struggle, was natural. Bursts of enthusiasm were witnesses in her behalf, in almost every part of our country, and an ardent desire was evinced to make common cause with her in favor of liberty. And this was claimed of our country as a debt of gratitude, and on the ground of treaty stipulations.

Had this tide of popular feeling, which threatened to bear down everything in its course, not been checked, our destinies would have been united with those of France. We might have participated in her military glory, and in the renown of her heroes. And the struggles, in which we would have been involved, might have given birth to a race of heroes in our own country, whose deeds of chivalry would have been celebrated in history. But our country would have been wasted by war and rapine; and the pen of the historian, which recorded the deeds of our heroes, would, also, have told, in all probability, that our country, like France, was driven to take refuge from the turbulence of party factions, under a splendid military despotism.

Fortunately for the country Washington lived, and the veneration in which his name was held, and the authority he exercised, mainly contributed to check the excitement, and preserved the peace and lasting prosperity of the country.

The struggle of the people of South America, against the oppressions of their own government, again awakened the sympathies of our country, and produced a strong desire with many to unite our fortune with theirs. But this feeling was controlled, and the neutrality and peace of our country were preserved.

A government is justly held responsible for the acts of its citizens. And if this government be unable or unwilling to restrain our citizens from acts of hostility against a friendly power, such power may hold this nation answerable, and declare war against it. Every citizen is, therefore, bound by the regard he has for his country, by his reverence for its laws, and by the calamitous consequences of war, to exert his influence in suppressing the unlawful enterprises of our citizens against any foreign and friendly power.

History affords no example of a nation or people, that uniformly took part in the internal commotions of other governments, which did not bring down ruin upon themselves. These pregnant examples should guard us against a similiar policy, which must lead to a similar result.

In every community will be found a floating mass of adventurers, ready to embrace any cause, and to hazard any consequences which shall be likely to make their condition better. And, it is believed, that a large portion of our citizens, who have been engaged in military enterprises against Canada, are of this description.

That many patriotic and honorable men were at first induced, by their sympathies, to countenance the movement, if not to aid it, is probable. But when these individuals found that this course was forbidden by the laws of their country, and by its highest interests, they retraced their steps. But, it is believed, that there are many who persevere in their course, in defiance of the law and the interests of their country. Such individuals might be induced to turn their arms against their own government, under circumstances favorable to their success.

These violators of the law should not escape with impunity. The aid of every good citizen will be given to arrest them in their progress, and bring them to justice. They show themselves to be enemies of their country, by trampling under foot its laws, compromising its honor, and involving it in the most serious embarrassment with a foreign and friendly nation. It is, indeed, lamentable to reflect, that such men, under such circumstances, may hazard the peace of the country.

If they were to come out in array against their own government, the consequences to it would be far less serious. In such an effort, they could not involve it in much bloodshed, or in a heavy expenditure; nor would its commerce and general business be materially injured. But a war with a powerful nation, with whom we have the most extensive relations, commercial and social, would bring down upon our country the heaviest calamity. It would dry up the sources of its prosperity, and deluge it in blood.

The great principles of our republican institutions cannot be propagated by the sword. This can be done by moral force, and not physical.

If we desire the political regeneration of oppressed nations, we must show them the simplicity, the grandure, and the freedom of our own government. We must recommend it to the intelligence and virtue of other nations, by its elevated and enlightened action, its purity, its justice, and the protection it affords to all its citizens, and the liberty they enjoy. And if, in this respect, we shall be faithful to the high bequests of our fathers, to ourselves, and to posterity, we shall do more to liberalize other governments, and emancipate their subjects, than could be accomplished by millions of bayonets.

This moral power is what tyrants have most cause to dread. It addresses itself to the thoughts and the judgments of men. No physical force can arrest its progress. Its approaches are unseen, but its consequences are deeply felt. It enters garrisons most strongly fortified, and operates in the palaces of kings and emperors.

We should cherish this power as assential to the preservation of our own government; and as the most efficient means of ameliorating the political condition of our race. And this can only be done by a reverence for the laws, and by the exercise of an elevated patriotism.

But if we trample under our feet the laws of our country; if we disregard the faith of treaties, and our citizens engage without restraint in military enterprises, against the peace of other governments, we shall be considered and treated, and justly too, as a nation of pirates.

Punishments, under the law, can only be inflicted through the instrumentality of the judicial department of the government. The federal executive has shown a zeal, worthy of the highest commendation, in his endeavor to check the career of these enemies of social order. He has very properly employed a part of the military force of the country in this service; and he has solemnly warned and admonished these deluded citizens, who seem ready to carry devastation into the neighboring province of a foreign and friendly power. These efforts of the President are in aid of the civil power, which, I trust, will not be found wanting on this, or any other emergency, in the discharge of the great duties which have been devolved upon it by the constitution and laws. But in vain will the civil authority be exerted unless it shall be aided by the moral force of the country. If the hands of the ministers of justice were not strengthened by public sentiment, how ineffectually would they be raised for the suppression of crime. If the open violator of the law be cherished by society, he may with impunity set at defiance the organs of the law. The statute book which contains the catalogue of offences, would then become a dead letter and would be a standing monument of deeply seated corruption in the public.

I invoke in behalf of the tribunals of justice, the moral power of society. I ask it to aid them in suppressing a combination of deluded or abandoned citizens, which imminently threatened the peace and prosperity of the country. And I have no fears, that when public attention shall be aroused on this deeply important subject; when the laws are understood, and the duties of the government; when the danger is seen and properly appreciated, there will be an expression so potent, from an enlightened and patriotic people, as to suppress all combinations in violation of the laws, and which threaten the peace of the country.

MR. JUSTICE CAMPBELL'S CHARGE TO THE GRAND JURY AT NEW
ORLEANS, APRIL 30, 1855.

NOTE:—The charge was printed in full in the "New Orleans Bee," of May 1st, and so much of it as refers to the neutrality laws was reprinted in the "National Intelligencer" at Washington on May 24th, 1855, with the following editorial introduction:

[From the National Intelligencer, May 24, 1855.]

"ONE WORTHY OF THE ERMINE.

"It is always a source of pleasure to us to have it in our power to record an instance of the upright independence of the judiciary. We adverted briefly in a late number of our paper to the causes of the decline of filibustering in the South, attributing it in the main, and justly, to the decided discountenance and inhibition of it on the part of the Executive. We might have added to this reason, and with equal justice, the firmness and the fearless determination of the able Judge of the Southern Circuit (Judge Campbell) to maintain inviolate the laws of the United States relating to our neutral obligations and to our intercourse with other nations. This conduct of the Judge, combined with the measures more immediately emanating from the Chief Magistrate, has operated doubtless to check at least the lawless attempts which have been made to fit out hostile expeditions against Cuba. Living, as it were, in the midst of the people among whom these lawless enterprises have found most favor, Judge Campbell has shown a degree of honest boldness in a recent charge to the Grand Jury at New Orleans which entitles him to the gratitude of every citizen who values the honor of the country more than any treasure which the sacrifice of that honor could purchase. While the country is blessed with such faithful officers to enforce the laws and punish offenders we may trust in the stability of our Government, notwithstanding the clouds which fanaticism casts over the political horizon. We subjoin from the charge to which we have referred an extract, which we commend to the attentive perusal of our readers."

Judge Campbell's Charge to the Jury.

Gentlemen of the Grand Jury: Your office in the organization of the Court is, to inquire diligently for any violations of the penal laws of the United States within the limits of this District, or which are cognizable by this Court, and to present the offenders for trial.

The Criminal Code of the United States and the jurisdiction of

the Court over offenders, are to be ascertained from Acts of Congress on the subject. The Federal Administration is concerned for the most part, with the international relations of the United States, and those objects of domestic interest in which the States are generally interested, and rarely touches any matter merely of local importance or municipal interest. The currency and revenue—intercourse by means of the commercial marine, the post-office and postal arrangements, the security of public property, the distribution of justice through a limited judicial power, the protection of persons and private property on the high seas, and where the jurisdiction of the States does not extend, are the prominent letters of the code.

Provisions exist in that code to guard the coin and revenue; to prevent bribery, perjury, extortion or obstruction among or to public officers; to preserve the mails from robbery and theft and correspondence from violation.

To punish piracy, larceny, revolt, mutiny on shipboard upon the high seas, to secure seamen from cruelty and abuse, and the lives of passengers from mismanagement and negligence, and to enforce the observance of the treaties of the United States, pledging our citizens to relations of peace and friendship.

This code does not relate to those agitating concerns of society out of which crime most commonly arises, and consequently prosecutions are comparatively infrequent in the courts of the United States. I do not consider it necessary, therefore, to enter into a definition of the several offenses it embodies. I shall merely refer to such as I consider it proper for you distinctly to understand.

In the excited state of the public mind, arising from the existence of wars abroad, and the internal commotions prevailing in the countries bordering upon or lying in the Gulf of Mexico, it is necessary that the laws of the United States upon the subject of our foreign relations should be distinctly understood, and that confidence in their firm administration be inspired. The States which lie upon the Gulf are exposed to the mischief attendant upon the neglect or disregard of these laws. They are liable to become the seat of the intrigues and conspiracies of those who would disturb the peace of those countries by expeditions or enterprises from this, or who would involve this country in hostilities with them.

The Act of Congress on the subject of the preservation of the neutral relations of the United States was passed in 1818, and is nearly a transcript of an act passed during the administration of General Washington.

No attempt to repeal or to suspend this act has met with any favor from Congress. It is a law passed in the fulfillment of a constitutional duty by the Legislature of the Union, and is clearly within the limits of its powers. The act embodies the sense of the people of the United States in reference to the line of conduct proper, not only for an individual to pursue, but also what the

Government should compel, in justice to the nations with which the United States are at peace.

The act forbids an American citizen within its territories to accept and exercise any military or naval commission to serve any state or people, against a prince, state, colony, district or people with whom the United States are at peace.

It forbids any person to enlist himself, or to hire or retain another person to enlist or enter himself or to go beyond the limits of the United States, with the intent to be entered or enlisted in the military or naval service of any foreign power.

Thus you will perceive that every contract for military or navy services between the agents of a foreign nation and our own citizens, is punishable as a high misdemeanor.

The act proceeds to prohibit the formation within the United States of military or naval expeditions or enterprises to be carried on against a friendly power. The arming, furnishing or fitting out of any vessel for the use of any foreign power, to commit hostilities upon the government or subjects of a government with which the United States are at peace, subject all who shall knowingly be concerned in any of those acts to a public prosecution.

The act further, as if to erect a barrier against every effort on the part of the citizens of the Union to obstruct or to defeat the policy which Congress or the Executive may adopt in regard to the peaceful relations of the United States, denounces as a high misdemeanor the commencement of any military expedition, or enterprise, or the preparation or procurement of the means for one to be carried on from the United States against the territory or dominions of any power with which they are at peace.

The people of the United States have confided to their responsible public authorities the determination of the grave questions of the existence of war and peace, and will not allow their decision to be disturbed by the cabals, intrigues, or plots of private or secret associations, much less of juntas composed of aliens to our soil. Hence every way by which a state of hostilities may be reached by citizens in any combination or concert is sedulously guarded in this act.

When the officer who is to lead or direct the enterprise performs in this country a single act under his commission he is exposed to a presentment from the Grand Jury. Each soldier, seaman or mariner, who shall be enlisted, all who form a part of a military expedition, who shall supply it with those things necessary for it, or who shall aid or abet, or stimulate it, become guilty as principals.

It is unnecessary for one to vindicate the policy of this enactment. This was done when it was adopted. The citizens of the United States, as they value their own Constitution, so long as the act remains a part of the public law, owe it a frank, cordial and loyal obedience.

It is the duty of those charged with the administration of the laws, to maintain its provisions firmly and consistently; and that you may perform your part of this public duty, I have brought its provisions directly to your notice.

I think it proper to bring to your notice the laws for the protection of correspondence through the mails of the United States. It is unnecessary for me to speak to you of the importance of this great department of the Government, nor of the necessity for a scrupulous fidelity, in every part of its administration. All will agree that it penetrates through every portion of the Union having interests and enjoyments of the greatest import dependent upon it. The legislation of Congress is commensurate with the magnitude these concerns.

The Acts of Congress provide punishments for persons employed in any of the departments of the Postoffice who shall unlawfully detain, delay, or open any letter, packet, bag, or mail of letters with which he may be entrusted, or which shall be intended to be carried by post.

They also provide punishments for persons of the same class who shall secrete, embezzle, or destroy any letter, packet, mail, or packet of letters with which he may be entrusted, or which shall have come into his possession, and are intended to be conveyed by post, containing bank notes, promissory notes, contracts, covenants, bills of exchange, etc., including in the specification every security of value in common use.

There are Acts of Congress providing punishments for persons not connected with the Postoffice who may be guilty of such offences.

The Grand Jury have the right, and it is their duty, to make a diligent inquiry into all the offences given them in charge, or of which they have any personal knowledge. You may call before you such witnesses as may be necessary to the ascertainment of the guilt of any party accused, or whose criminality you may suspect.

I direct your attention to the Act of Congress to provide for the security of the lives of persons on board of steam vessels. The sacrifice of life upon vessels of this description through the United States, without provoking any judicial inquiry, has brought reproach upon the national character, and severe reflections upon the administration of the laws. The officers and men engaged in the navigation of steam vessels have enjoyed such an immunity from responsibility, for disasters leading to the destruction of life and property, and the community has submitted with such supineness and apathy to their frequent occurrence, that it is not surprising that the laws have passed from the public observation and notice.

In the absence of the laws, and a severe and stringent investigation of the cause of every catastrophe on board steamboats involving life, there is no security on such vessels. Public opinion has been found impotent to correct the mischief. In many instances the

offender by some show or effort to mitigate the consequences, or by enlisting the sympathy of the public by well prepared appeals, have made a pecuniary profit from his acts of negligence and mismanagement. The offender is generally exonerated from censure upon unsubstantial testimony. The legislation of the United States maintains a healthy and robust action on this subject. It requires those who undertake the charge of vessels of this description—vessels of great power, requiring care and skill to conduct them to bring to the task adequate skill, capacity and diligence.

These on the grounds of public confidence, and Congress will not tolerate their absence.

Every captain, pilot or engineer, or other person employed upon any steamboat, by whose misconduct, negligence or inattention to his or their duties, the life or lives of any person may be destroyed, shall be guilty of manslaughter.

My charge to you is, that if within this district any loss of life has occurred by reason of any collision, conflagration, or the explosion of boilers of any steamboats, or from any mismanagement, it is your duty to examine into the facts, so that an offender may not escape.

There is an act of much stringency upon the fitting of steamboats with a view to the preservation of the lives of those on board, and an act regulating the equipment and furniture of ships for immigrants, to which I direct your attention. These acts are of importance in reference to intercourse, and are framed in a spirit of humane regard for life, and its protection from the recklessness and hard-heartedness which have brought so much of suffering upon helpless persons. The district attorney will aid you with his skill and counsel if you find any cases which fall within them.

In reference to all the acts of Congress I have referred to and the criminal code generally, the court can do nothing without your active co-operation. You are charged with inquisitorial powers, not to gratify malice, or to show favor or affection, but that the community may be guarded from a violation of its laws. I charge you to exercise these powers rationally, conscientiously—and in these are implied a firm and energetic employment of them if you find a necessity for so doing.

By these means you can maintain confidence in your community and insure to the rest of the United States the benefits which will accrue from a faithful administration of the laws in this district.

APPENDIX IV.

JUDICIAL DECISIONS.

JUDICIAL DECISIONS IN THE COURTS OF THE UNITED STATES RELATING TO THE NEUTRALITY LAWS.

UNITED STATES VS. GRASSIN. 3 WASHINGTON CIRCUIT COURT REPORTS, 65.

(*October Term, 1811. Circuit Court of U. S., District of Pennsylvania.*)

Before HON. RUSHROD WASHINGTON, *Associate Justice of the Supreme Court of the United States* and HON. RICHARD PETERS, *District Judge*.

The defendant, the commander of a French cruiser, called the *Diligent*, belonging to a subject of France, a Mr. Guyon, domiciliated at New-York, arrived at this port in April or May last. The defendant reported himself to have come in, in distress, and applied to the custom-house, and obtained a permit to land her cargo, guns, &c., and to repair. The cargo, and other articles mentioned in the application for a permit, were placed under the care of a custom-house officer; but the eight gun carriages hereinafter mentioned, were not enumerated in that paper, though the eight guns were. It appeared, in evidence, that this vessel was fitted out in France—that she was chased by a British ship of war, and in order to lighten herself, threw all her guns overboard, except one long six-pounder. She afterwards fell in with a British letter-of-marque, from which she took out eight 12-pound carronades, with their carriages; and after keeping them mounted on deck for three or four days, they were put into the hold, where they remained when she came to this port. Before the repairs of the vessel were completed, these gun carriages were sent on shore, to a Mr. Seguin, the carpenter employed in repairing the vessel, who added about from $4\frac{1}{2}$ to $7\frac{1}{2}$ inches of new wood to them, so as to raise them, in order to fit the port holes, as was contended, and proved, by witnesses on the part of the prosecution, but contradicted by the defendant's witnesses; viz. Seguin and his workmen, who swore, that the carriages were not raised, but merely, that the decayed parts were cut away, and replaced by new wood. The carriages, being thus altered, were returned on board the *Diligent*, but being discovered by some of the custom-house officers, they were relanded, and the *Diligent* sailed without them. It was very fully in proof, that the guns upon the carriages, as they were originally, could not be fought through the port holes of the *Diligent*, and that it was necessary to raise them; although, one of the mariners swore, that they could be fought, and that they were fired to bring vessels to, during the few days they were mounted. It appeared, that the defendant was sick and confined to his room, during the greatest part of the time that these repairs were making;

and that the owner was here nearly the whole time, and acted in relation to the repairs.

WASHINGTON, Justice, charged the jury. The first question is, whether an addition made to gun carriages, either by raising, or otherwise altering them, is an offence, within the fourth section of the Act of Congress of 5th June, 1794? It is admitted, that the addition of entire new gun carriages is an augmentation within the law; but the alteration of old carriages is denied to be so. To the Court, it seems, that nothing can be more plain than the meaning of this section.

The offence consists in increasing, or augmenting, or procuring, or being knowingly concerned, in increasing, or augmenting, the *force* of any belligerent vessel, which was armed at the time of her arrival within the United States by adding to the number or size of her guns, *prepared for use*; or by the addition thereto, (that is to her force,) of any *equipment*, solely applicable to war. Suppose, then, that a vessel should arrive here, armed with twenty muskets, in complete order, and an equal number in her hold, but without locks, or otherwise useless—we ask, what would be her force, in guns prepared for use? The answer is obvious, twenty muskets; since the other twenty, not being prepared for use, can constitute no part of her force. But, if the other twenty are prepared for use, by adding locks, is not her force, then, forty guns prepared for use? The locks are an *equipment* solely applicable to war, and then the whole case is made out. For, the force of the vessel has been increased or augmented, by the addition of the guns prepared for use, by an equipment solely applicable to war. In like manner, if the vessel has but one cannon mounted and prepared for use, and other cannon, say eight, in her hold, dismounted, or on carriages too rotten, or too high, or too low to be used, her force is but one cannon. If, by raising or lowering the carriages, or replacing the decayed by sound wood, they are rendered fit for use, her force then becomes increased or augmented to nine cannon, prepared for use, and this, by an equipment solely applicable to war.

The second question is, whether the gun carriages of this vessel were so altered as to increase or augment her force? One witness has sworn, that the guns could be effectually used on the gun carriages as they were. You will judge, from the height of the port holes, and of the carriages, whether this was possible. That witness is contradicted on this point by others examined in support of the indictment. Whether they were *raised* or not is for you to determine; the witnesses being precisely at variance as to this point. But, it is proved by the defendant's witnesses, that the carriages were decayed, and were repaired by cutting away those parts, and substituting sound wood. It is, therefore, of no consequence, whether the sound wood which was put on, raised the guns or not; if by the addition or substitution of it, for that which was decayed, these guns were prepared for use, so as to augment the force of the vessel, be-

yond what it was at her arrival. If nothing was done but what might well have been done without; it would not be said, that her force was augmented, by the addition of the equipment—quite otherwise, if the addition or alteration was necessary, in order to prepare the eight carronades for use. On this point, therefore, you must decide according to the evidence.

The third point is peculiarly a subject for your consideration, being a question of fact merely. It is, whether the defendant procured, or was knowingly concerned, in the addition or alteration that was made in the gun carriages? *Prima facie*, every presumption is against the commander of a vessel, in such a case. It is scarce credible, that such important operations in respect to the armament of a vessel, should be undertaken by any person, without the orders of the commander. In addition to this, the omitting to mention these carriages, in the application to the custom-house for a permit to land, is calculated to excite suspicion, that some alterations were intended; because, if they had been mentioned, they would have been placed under the care of a custom-house officer, whose duty it would have been to prevent such alterations from being made. That the defendant knew of these alterations, is strongly contended for upon the evidence of the marshal; who swore, that after the arrest of the defendant, he stated to him that the intention was only to remove the decayed timber, and to substitute new. But, whether he spoke of his own intention, or of those who during his sickness had acted in the business, is by no means clear. In this case, the general presumption above mentioned is a good deal weakened, from the circumstance, that the owner was in Philadelphia during the whole time that these repairs were going on, and that during the greatest portion of that time, the defendant was sick and confined to his room. His knowledge of what was going on, were this fully proved, would not be sufficient to fix him with the offence unless he was in some way *concerned* in it. Upon this point, it is proper you should be satisfied. We have only to add, that if from the publications which were spoken of at the bar, you have received impressions unfavorable to the defendant, on account of acts done by him, unconnected with the offence for which he is now tried, we feel the fullest confidence that you will not suffer them to influence your feelings or your judgment; for, even if the charges made against him were proved, which in this case they were not, and could not be, they have nothing to do with the issue you are sworn to try.

The jury could not agree in this case, and frequently applied to the Court to discharge them. The Court informed the jury that they had not the power legally to discharge them, without the assent of the District Attorney, and the defendant's counsel. At length, after keeping the jury together for some time, this assent was granted by both sides, the Court agreeing to try the cause again this term, and the jury were accordingly discharged.

Ex Parte NEEDHAM ET AL. PETERS' CIRCUIT COURT REPORTS,
P. 487.

(October Term, 1817. Circuit Court of U. S., District of Pennsylvania.)

Before HON. BUSHROD WASHINGTON, *Associate Justice of the Supreme Court of the United States*, and HON. RICHARD PETERS, *District Judge*.

Habeas Corpus. The case appeared shortly to be as follows:

The petitioners, ten in number, being foreigners, enlisted or otherwise engaged in Holland to join the revolutionists in South America, and accordingly embarked for the United States with their military equipments, intending to obtain a passage from this country to South America. They arrived here under the command of Needham, who claimed or had in reality the title of colonel, and who exercised in Philadelphia during the short stay they made there, the authority of commander ordering them to appear at a certain place of rendezvous, where they were drilled and exercised. A passage was taken for them on board the *Ellen* for the island of St. Thomas, and their baggage was put on board. The *Ellen* fell down to Gloucester Point to take in the balance of her cargo, consisting of arms and munitions of war, and destined from St. Thomas to some point in the Spanish-American provinces, but before she left Gloucester Point she was stopped by admiralty process, and the prisoners were arrested and committed.

The court was of opinion, that upon the ground of an expedition carried on from the United States, with intent to commit hostilities against a power at peace with the United States, enough appeared to the court to justify the remanding of the prisoners. That it is unimportant whether the association to join the revolutionists originated in the United States or beyond seas. The expedition or enterprise was still carried on from the United States, and it was immaterial whether a company of armed men, proceeding from this country with such intentions, took the whole vessel to themselves, or merely departed hence as passengers. If a regiment of foreign soldiers, armed and equipped, should land in the United States and hire a vessel to transport them to South America, with intent to make war upon the Spanish king or his subjects, could it be contended that this was not an expedition fitted out from the United States, within the clear expressions and meaning of the third section of the act of 1794?

If such a case would come within the provisions of that law, it would seem difficult to distinguish it from the present.

Prisoners remanded.

UNITED STATES V. RAND AND OTHERS. 17 FEDERAL REPORTER,
P. 142.

(May 24, 1883. District Court of U. S. Eastern District of Pennsylvania.)

This was an indictment against Augustus C. Rand and Thomas Pender, the captain and mate of the steamer Tropic, for the violation of section 5286 of the Revised Statutes, relating to military expeditions against people at peace with the United States.

The facts are set forth in the charge of the court.

H. P. BROWN, Asst. Dist. Atty., and J. K. VALENTINE, Dist. Atty., for the United States.

ALFRED & ARTHUR MOORE, for defendants.

BUTLER, J., (charging jury). On the fifteenth day of March last the ship Tropic sailed from this port in command of the defendants—the one as captain and the other first mate—with a cargo of arms and military stores, consisting of rifles, muskets, cannon, cutlasses, ammunition, and uniforms. She proceeded direct to Inagua, where she arrived on the twenty-second of the same month, and during the night and the next day, took on board a large number of men, who were soon after put into uniforms, drilled, and prepared for active military service. She then proceeded to Miragoane, Hayti, where the men were disembarked, and an attack made upon the representatives of the Haytian government, there in command, and the town captured. During the attack the vessel rode outside the harbor, and immediately after ran in and landed her stores. On the return of the ship to this port the defendants were arrested, and are now on trial for an alleged violation of a statute of the United States, which reads as follows:

“Every person who, within the territory or jurisdiction of the United States, begins or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, colony, district, or people, with whom the United States are at peace, shall be deemed guilty of a high misdemeanor.”

That the attack upon and capture of Miragoane was the result of a military *expedition*, is clear. Was it begun or set on foot within the territory of the United States, to be carried on from thence, or the means here provided for such an expedition? As we have seen, the arms, military stores, and means for the transportation of them, and of the men subsequently taken on board, were here provided and started out. That the men were not taken on board until the vessel reached Inagua, is not, in the judgment of the court, material. The expedition, as it left this port, viewed in the light of subsequent events—the shipping of the men at Inagua, and the attack upon Miragoane—was, in the judgment of the

court, a *military enterprise*, within the terms and spirit of the statute,—a military enterprise *begun or set on foot within the territory* of the United States, *to be carried on from thence*. To enter upon a critical, abstract definition of the statute, here, would serve no useful purpose. The signification of its terms, in the aspect now involved, is sufficiently defined by what has been said. I repeat, the expedition which sailed from this port as described by all the testimony in the cause, was a *military expedition*, within the scope of the statute. The language—"to be carried on from thence"—is employed in the sense of *carrying out*, or *forward*, from thence.

The only controverted question of fact for your determination, therefore, is, were these defendants, or was either of them, connected with it, with knowledge of the circumstances, and with design to promote it? That they commanded the vessel, took out the arms, stores, and men, and landed them at the place of attack, is undisputed. Their defense is that they were ignorant of the enterprise; that they did not know what the cargo consisted of; that when the men were shipped they were supposed to be passengers; and that all the defendants subsequently did was the result of coercion. If that is true, it is a complete defense. Is it true? The defendants appeared before you as witnesses, and swore to it, circumstantially and in detail as you heard. The engineer and the second mate, who bears the same name as one of the defendants were called to prove the alleged coercion. You heard their testimony,—the statement that the captain appeared anxious to get away without landing the stores, etc.,—and must judge what weight this testimony is entitled to. Other witnesses testified that the captain exhibited alarm towards the close of his voyage, as the expedition neared its destination, and that he then declared his ignorance of its purpose at starting. What weight should be attached to these declarations, and to this exhibition of alarm, you must judge. Whether such alarm is inconsistent with a belief that that he was aware of the character of the enterprise from the start, you will consider. The instances are probably rare in which men carry out to the end hazardous enterprises involving property and life—even where most deliberately entered upon—without temporary moments of hesitation and alarm. In the light of surrounding circumstances, is the defense (that the defendants were ignorant of the character of the expedition, and were not intentionally connected with it at the time of starting out,) probable and credible? As you have been informed, the clearing of the ship here was irregular. The cargo was put on board in the manner stated by the witnesses, and the vessel sailed without making the usual entry at the custom-house. The captain appears to be a man of experience and intelligence. His failure of duty in this respect is, therefore, somewhat remarkable, if he was ignorant of the character of his cargo. You will judge whether his explanation (if what he says may be called an explanation) is satisfactory. Notwithstanding

the cargo was destined for Port Antonio, he went to Inagua, where he arrived about ten o'clock, and remained until the next morning, taking on board during the night a large number of men. You heard his explanation of this: that he was directed, on leaving this port, to touch at Inagua for orders, and that in taking the men on board he was obeying the orders there received. Is this explanation probable? The ship was not fitted out for the transportation of passengers, and, as he tells you, he knew that it was unlawful to carry them, in its condition. After starting out from Inagua, and returning with the steamer *Alva*, which he met, and being informed from the British man-of-war, lying near by, that he would not be permitted to take the additional large number of passengers which he desired to carry to Miragoane, he ran out to sea some fifteen miles, and lay there in the night, with his lights down, awaiting the arrival of these passengers, in pursuance of an arrangement that they should be brought to him at that place. He tells you that his lights were down because he was coerced into removing them; but in view of the fact that he was seeking to carry the men away against the orders of the man-of-war, and was manifestly lying where he was with the design to take them without discovery, you will judge whether the removal of his lights was not consistent with, and in furtherance of, this purpose; and whether, therefore, his statement that he was coerced into removing them is worthy of belief. You now find him at Inagua, with his cargo for Port Antonio, his vessel crowded with men, voluntarily taken on board,—a vessel unsuited to the carriage of passengers, and on which it was unlawful to carry them. He says he did not know why he was forbidden to carry the men to Hayti. You will judge, however, whether he did not understand that it was because the public peace there would be jeopardized by his doing so, and whether, therefore, he did not understand the character and purpose of these men when he voluntarily took them on board. Thence he started to Miragoane. He tells you that he now, or soon after, discovered the character of the expedition, and all that he subsequently did was the result of coercion. The men and stores were taken to Miragoane, and there put ashore in the manner and under the circumstances described by the witnesses. No fare or freight was paid or demanded. Although the American consul at Miragoane was seen and communicated with, no complaint appears to have been made, nor redress sought, for the alleged outrage upon the vessel; nor was any complaint made elsewhere subsequently; nor was the transaction reported to the consignors of the cargo, or the owners of the vessel, prior to the arrest. In the light of these circumstances, and of all the testimony bearing upon the question, do you believe that the defendants did not know the character of their cargo, and were not aware of the intended attack on Hayti on leaving this port? If you do so believe, you must acquit them; and it will, no doubt, in such case be a pleasure to do so. On the

other hand, if you believe they were aware of the character of the cargo, and started out for the purpose of carrying it, and the men subsequently taken on board, to Hayti, for the purpose of making the attack afterwards made there, you should convict them. The defendants are entitled to the benefit of any reasonable doubt you have on the subject. The case is an important one, and deserves your most serious consideration. The statute involved is founded in a wise and beneficent purpose—the discharge of an important national duty towards other friendly powers; and its violation involves the national honor as well as the public peace.

You will bear in mind that you may convict one of the defendants and acquit the other, or convict or acquit both, as your judgments dictate.

UNITED STATES V. THE MARY N. HOGAN. 17 FEDERAL REPORTER, P. 813.

(August 10, 1883. District Court of U. S., Southern District of New York.)

In Admiralty.

BROWN, J. The steam-tug Mary N. Hogan being in the custody of the marshal, under arrest upon process issued for her forfeiture to the United States, application is made in behalf of John H. McCarthy, her alleged owner, for the appointment of appraisers to determine her value, preliminary to giving bond for her release from custody. The application is opposed by the district attorney on the ground that the claimant is not, in this case, entitled to bond the vessel. The proceedings for the forfeiture of the vessel are instituted under Sections 5283 and 4189 of the Revised Statutes. The former section subjects to forfeiture any vessel “furnished, fitted out, or armed within the limits of the United States with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace.” The libel charges that the Mary N. Hogan, on or about the fifteenth of July, 1883, was furnished, fitted out, or armed within this district, with the intent that she should be employed in the service of certain rebels in the island of Hayti, to cruise or commit hostilities against the subjects, citizens, or property of the island of Hayti, with which the United States are at peace.

By section 4189, also, every vessel is made liable to forfeiture whose certificate of registry “is knowingly and fraudulently obtained;” and the libel charges that John H. McCarthy, on or about the fifteenth day of July, 1883, knowingly and fraudulently procured the registry of said vessel in his name as sole owner, upon

oath that there was no subject or citizen of any foreign prince or state directly or indirectly interested in her, whereas, in fact, a foreign citizen was part owner.

The proceedings for the forfeiture of the vessel are proceedings in admiralty, and governed by the admiralty rules. The appointment of appraisers and the bonding of the vessel are claimed under rule 11 of the Supreme Court rules in admiralty, which provides that "where any ship shall be arrested, the same *may*, upon the application of the claimant, be delivered to him upon due appraisement to be had under the direction of the court, upon the claimant's depositing in court so much money as the court shall order, or upon his giving stipulation with sureties," etc.

In the great majority of cases suits are brought, and the arrest of the vessel is made, for the purpose only of securing payment of some pecuniary demand. In such cases the object of the suit will be fully secured by permitting a good bond, with sureties, to be substituted as security in place of the vessel during the pendency of the litigation; and thereby not only is the great expense of keeping the vessel in custody for a considerable period avoided, but the vessel is also allowed in the meantime to be engaged in the pursuits of commerce. Rule 11 is clearly designed for this purpose. It is not in form imperative in all cases of the arrest of vessels, but provides only that the vessel "*may*" be delivered, etc.; thus leaving to the court a discretion which may be rightly exercised under peculiar circumstances; and, as it seems to me, the rule clearly should not be applied in those cases where the object of the suit is not the enforcement of any money demand, nor to secure any payment of damages, but to take possession of and forfeit the vessel herself in order to prevent her departure upon an unlawful expedition, in violation of the neutrality laws of the United States. Such, by the statements of the libel, appears to be the sole object of this suit; and to permit the vessel, as soon as arrested, to be bonded by the very persons alleged to be engaged in this unlawful expedition, and bonded presumably for the purpose of immediately prosecuting it, would be to facilitate in the most direct manner the unlawful expedition, and would practically defeat the whole object of the suit, and render the government powerless by legal proceedings to prevent the violation of its international obligations.

No section of the statutes other than section 5283, fully meets the circumstances of this case. That section is rightly invoked to enable the government to preserve itself from large possible liabilities through a violation of its treaty obligations to Hayti. It is clearly not the intention of section 5283, in imposing a forfeiture, to accept the value of the vessel as the price of a hostile expedition against a friendly power, which might entail a hundred-fold greater liabilities on the part of the government. No unnecessary interpretation of the rules should be adopted which would permit that result; and

yet such might be the result, and even the expected result, of a release of the vessel on bond. The plain intent of section 5283 is effectually to prevent any such expedition altogether, through the seizure and forfeiture, of the vessel herself. The government is, therefore, entitled to retain her in custody, and rule 11 cannot be properly applied to such a case.

Upon the papers submitted it appears that the proceedings are promoted at the instance of responsible officers of the Haytian government; and there is no evidence before me tending to show that the proceedings are in bad faith, or malicious, or on insufficient *prima facie* grounds; and the application for appraisers for the purpose of bonding should, therefore, be denied.

As the vessel is in custody, either party, under the rules of the court, is entitled to an immediate trial. No term for the trial of calendar causes being in session at this time, upon the consent of the United States attorney, already given in open court, the claimant upon filing his answer to the libel, may have an immediate order of reference to the clerk to take the testimony in the cause and when completed the case may be submitted, and will be at once disposed of.

UNITED STATES VS. THE MARY N. HOGAN. 18 FEDERAL REPORTER,
529.

(November 23, 1883. District Court of the U. S., Southern District of
New York.)

Information for Violation of Neutrality Laws.

ELIHU ROOT, Dist. Atty., for the United States.

GEORGE H. FORSTER, for claimant.

Brown, J. On the twentieth day of July, 1883, the steam-tug Mary N. Hogan was seized at this port by order of the collector. The information in the case was thereupon filed to procure her condemnation, upon two grounds: *First*, for violation of section 5283 of the Revised Statutes, in being fitted out with the intent that she should be employed to commit hostilities against the recognized government of Hayti; and, *second*, for a violation of section 4189, 4142, in being knowingly and fraudulently registered in the name of John H. McCarthy, under a false oath that no subject or citizen of any foreign prince or state was directly or indirectly interested in the vessel. The Mary N. Hogan was a steam-tug of about 37 tons register, 90 feet long, 20 feet beam, and 9 feet depth of hold, built for ordinary towing service about the harbor of New York, and in no respect distinguishable by any peculiarities from the numerous other tugs of her class in this port. Her draught, loaded,

was about 9 feet, and her full speed, when in good order, 10 to 11 knots. When seized on the twentieth of July she was nearly ready for sea, it having been given out that she was to proceed to Port Antonio, Jamaica, for the purpose of assisting in raising the steamer Calvert, which had been sunk in that harbor by a collision. At the time of seizure she had all her coal on board for the voyage. She had previously received some repairs, none of a very important character, the chief of which were replacing a somewhat decayed beam by a new one, and the addition of a keel condenser for the purpose of obtaining fresh water on the voyage. Several examinations by experts on behalf of the government previous to the seizure failed to discover any repairs or preparations indicating any intended service in military or naval operations. No arms, ammunition, or other warlike appliances were on board. From the evidence it clearly appears that though the Hogan was wholly unadapted to effective naval operations against any considerable organized opposition, she could be of the greatest service to the insurgents by her light draught and considerable speed in landing or taking off men at unprotected points on the coast of Hayti by watching her opportunities of running in and out, as well as in offensive demonstrations against defenseless parts of the island, with little to fear from the slight naval resources of the lawful government. U. S. v. Rand, 17 Fed. Rep. 142.

The facts upon which the prosecution relies are mainly as follows:

Since March, 1883, an insurrection has been in progress in Hayti by armed insurgents at war with the pre-existing government, which had been and still is alone recognized in this country as the lawful government of that island. The insurrection originated at the port of Miragoane, through an expedition which started from Philadelphia on March 15, 1883, upon the steamer Tropic, with arms and ammunition, nominally bound for Kingston, Jamaica. The Tropic did not go to Kingston, but went to the island of Inagua, about 30 miles from Hayti, where she took on board Gen. Boyer Bazelais, the recognized leader of the rebellion, with 75 or 100 armed men, and about the same number afterwards from an English steamer at sea, and then proceeded to the port of Miragoane, where Gen. Bazelais, with all the men, arms, and ammunition were landed about daybreak, and the insurrection successfully inaugurated. Bazelais, before leaving Jamaica, had supplied one Simon Soutar, a merchant of Kingston, who was interested in the Haytian insurrection, with money for the purpose of purchasing arms and ammunition. The arms and ammunition which went out upon the Tropic were purchased in New York by Henry A. Kearney, upon Soutar's order, from Joseph W. Fraser, of this city, and were shipped by the latter to Philadelphia, and there shipped on board the Tropic by Kearney. See U. S. v. Rand, *supra*.

In June, 1883, Mr. Soutar came to this city. Acting in his behalf, Kearney entered upon negotiations for the purchase of a tug-boat, and on the twenty-third of June made a contract with one Moran for the purchase of the Hogan, at the price of \$11,600. Prior to this time Soutar had been made acquainted with John H. McCarthy, a roving and adventurous navigator, experienced in blockade running, and made three times a prisoner during the war of the rebellion, who had served at Sebastopol and in the Mediterranean, and was familiar with the waters of the West Indies. Upon the purchase of the Hogan all the money was supplied by Soutar to Kearney who paid it to Moran, while the contract of purchase and the bill of sale of the vessel were taken in the name of McCarthy. On Monday the twenty-fifth of June, the register of the vessel was made in the custom-house in the name of McCarthy, upon a bill of sale delivered to him at that time, and McCarthy at the same time executed a bill of sale from himself to Philip William Abbott, a resident of Kingston, Jamaica, also interested in the Haytian insurrection, and described by McCarthy as the partner of Soutar. At the time of the registry of the vessel in the name of McCarthy, he made oath that "no citizen or subject of any foreign state or prince was interested in the vessel directly or indirectly." The bill of sale to Abbott was never registered. McCarthy testifies that he supposed it to be a mortgage; that he understood previously that he was to take the title of the Hogan and execute a mortgage back for the full price; that he did not expect to pay for the vessel in any other way than by the mortgage. McCarthy states that he was engaged to act as captain of the tug, to assist in raising the Calvert at Port Antonio, and to do toking around the island, for which he was to receive \$125 per month. After the purchase of the Hogan, McCarthy went into possession as captain, took her to Astoria, where the repairs above mentioned were made, and afterwards obtained a supply of coal at Hoboken, whence he returned to pier 28, East river, to take in additional stores preparatory to departure upon his voyage. McCarthy procured seamen and engineers for the voyage; but all the bills, with unimportant exceptions, were paid by Kearney, with money supplied by Soutar, and Kearney had the general direction and supervision of the Hogan in this port.

While these preparations on the Hogan were in progress, Soutar purchased from Fraser various arms and ammunition, to the value of \$7,000, including rifles, a twenty-pound army Parrot gun, a three-inch Parrot gun, and two field carriages. They were in part shipped by Fraser at pier 28, East river, on board the schooner E. G. Erwin, which cleared for Richmond and sailed on July 18th, two days before the seizure of the Hogan. The rest of the arms, being left behind through the Erwin's sailing earlier than Fraser had expected, were forwarded by rail and taken on board the Erwin at

Lewes, Delaware. The shipment of the arms on board the schooner *Erwin* was arranged by one George W. Brown, a ship-broker, at the request of Kearney, who knew Brown to have been previously successful in arranging for the shipment of warlike material to the Cuban insurgents. Brown prepared private signals and instructions for the captain of the *Erwin*, to the effect that the arms and ammunition in question should be transferred in the vicinity of Hog Island, Hampton Roads, to a steamer which would meet him there and give the signals agreed on, and that the arms and ammunition should be delivered on presentation of the schooner's receipts and payment of his charges. A copy of these instructions and signals was given to Kearney. The *Hogan* was seized on the 20th. No vessel met the schooner near Hog Island or Hampton Roads, as was designed and the *Erwin*, after cruising several days in that vicinity, and finding no vessel to answer the concerted signals, went on her way to Richmond, for which place she had other goods. Shortly afterwards the arms and ammunition purchased by Soutar were seized by the Federal authorities at Richmond; but before this was known to Kearney he had told Brown that no vessel had met the *Erwin* in Hampton Roads; that she had taken the arms to Richmond; and that he desired Brown to arrange for their transport to the West Indies. Brown thereupon made partial arrangements, at Kearney's request, to take the arms and ammunition to the Island of Navassa, a small guano island, without harbor or ordinary habitations, between Jamaica and Hayti, and about 40 miles from the latter. Intelligence of the seizure of the arms at Richmond put an end to further negotiations on that subject.

Four witnesses gave direct testimony of the statements of McCarthy as to the destination of the *Hogan*. McCormick, a constable of Brooklyn, testified that McCarthy told him that he expected to clear the next Wednesday for Hayti, and that he expected to take two guns aboard on the way. Mary Costigan testified that McCarthy engaged her husband for first engineer, and also to serve as a gunner, in which capacity he had previously served, and that he said he was going to Miragoane, Hayti. Her husband and one Cox testified that McCarthy said they were going to fight Hayti, and would take in arms on the way.

The claimant gave no evidence touching the destination of the arms and ammunition purchased of Fraser; and, as regards the destination of the *Hogan*, he relied solely upon the statement made to various persons in the course of the negotiations for the purchase of the *Hogan*, and on the testimony of Capt. McCarthy that she was designed to go to Port Antonio for the purpose of raising the wreck of the *Calvert*. Neither the claimant Abbott nor Soutar appeared as witnesses, nor was their testimony taken by commission.

A letter from Soutar to Kearney, dated July 3, 1883, was introduced in evidence, the material parts of which are as follows:

"Soutar & Co.

" KINGSTON, 3d July, 1883.

"Address for Telegrams,

“Jamaica.

"Soutar, Jamaica.

"H. A. KEARNEY, Esq., 1400 Sixth Avenue, New York.

“DEAR SIR: The writer duly arrived on Friday, and we are now anxiously waiting advices from you, as we expected everything would have been ready and dispatched ere this. We telegraphed you yesterday, ‘Salaried standard, Calvert’s matter,’ but up to present, 1 P. M., have no reply. We should like the Calvert’s matter put in hand as early as possible. If you have already procured two schrs., long 3-masters, of from 300 to 350 tons register, then get made at Perry & Jones’, Wilmington, Del., or at any of the machine shops, 4 4-inch screws about 12 feet long, with a square thread of 3-8 of an inch, and 5-8 deep, with a lever of 8 feet long. * * * See that everything is completed and dispatched as soon as possible.

* * * Captain Edwards, whom the writer saw at B. I. Werberg's, asked \$1,000 a month for 320-ton schooners, but would take less.

* * * We think the plan of raising her with screws the best, and would like to get under way as soon as possible. If you can get letters out to us by Warner & Merritt's steamers, write us by that way as well as by mail, and perhaps Mr. Merritt may be able to help you in getting the schooner or screws, or in some other way in the Calvert's matter. She has been lying under water too long already, and we are very anxious to get to work as early as possible. * * *

The claimant also proved the purchase by Soutar of the wreck of the Calvert for \$500; that in July Kearney was negotiating in New York for the purchase or lease of two three-masted schooners, to be used in raising the Calvert, which, however, were not obtained here; that four beams and jack-screws, with chains, were in August shipped to Port Antonio for the purpose of raising the Calvert; that the Erwin carried some arms and ammunition on the voyage above referred to, consigned by way of Richmond, to *bona fide* purchasers in the interior; and that great alterations and strengthening would be necessary in the Hogan to make her fit for any considerable permanent naval operations, or for any successful contest with armed antagonists.

No testimony was offered by the claimant to show what vessel was expected to receive the arms and ammunition from the Erwin in Hampton Roads; nor was any explanation offered of the title of the vessel being first taken in the name of McCarthy and then by a secret bill of sale transferred to Abbott.

The only rational inference that can be drawn from the above facts is that the Hogan was designed to be used for the conveyance

of arms and ammunition in aid of the insurrectionists in Hayti, and for other aid, and such hostile demonstrations as she was fit to make against the defenseless parts of the coast. The circumstantial evidence, together with the direct evidence of four witnesses, strongly sustains this conclusion; while the ostensible purpose of the Hogan's voyage has little that is natural, plausible, or probable to sustain it; and other circumstances, easy for the claimants to have explained if the Hogan was destined upon a legitimate business, are left wholly unexplained. Expeditions of this character are highly penal. Vessels cannot be fitted out or be cleared without more or less publicity. It is to be expected, therefore, in every case of such unlawful expeditions, that some pretext will be given out which must have connected with it some circumstances of reality to be of any value; and the question is necessarily presented whether the ostensible purpose of the voyage, more or less plausible, is the *bona fide* and sole object, or only a cover for departure upon a hostile expedition, as in the case of the Tropic.

All the circumstances in this case seem to me to show that the ostensible purpose for which the Hogan was going was a pretext, and not the real object of her voyage. While some direct evidence may not be wanting, yet for the most part cases of this sort must depend upon circumstantial evidence. In the *Slaver Cases*, 2 Wall. 401, the court say: "Ships of this description necessarily give rise to a wide range of investigation, for the reason that the purpose of the voyage is directly involved in the issue. Experience shows that positive proof in such cases is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances as the means of ascertaining the truth. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof." So, in Judge BETTS' charge to the grand jury, as quoted in Wharton's Criminal Law, in relation to the neutrality act, he says:

"It must be manifest to you, gentlemen, that these criminal designs, if entertained, will be managed with much disguise and caution; it is not probable that soldiers will be openly enlisted, or officers commissioned, or vessels freighted to transport munitions of war or men to the field of action. Pretenses and coloring will be employed to mask the real object the parties to such criminal projects contemplate. But if you discover the purpose really to be to supply the means of hostile aggression against Cuba, then all persons connected with it, and promoting it, will be answerable for the violation of the laws of the United States in the undertaking, the same as if their proceedings had been openly and avowedly intended for a hostile invasion, and waging war on that community."

In the present case there are four lines of groups of evidence which all concur in the conclusion I have stated: (1) The circumstances connected with the simultaneous purchase by Soutar of a

large quantity of arms and ammunition and of the Hogan, and their intended dispatch about the same time with the intended transshipment near Hog island; (2) the absence of explanations within the power of the claimant, if the expedition were legitimate and lawful; (3) the direct evidence inculcating the Hogan; and (4) the improbabilities that the purchase of the Hogan was simply to raise the wreck of the Calvert, as suggested.

1. Soutar was the agent of Bazelais, the leader of the insurrection in Hayti, and had enabled the latter successfully to inaugurate the revolt through an expedition which Soutar had organized in this country, with arms and ammunition purchased in New York and shipped to Philadelphia on the Tropic, under a false clearance for Kingston, in March, 1883. In June, three months afterwards, we find Soutar himself in this country again purchasing \$7,000 worth of arms and ammunition, which subsequent events clearly prove were destined for the support of the insurrection in Hayti, and simultaneous therewith negotiating, through Kearney, for the purchase of a steam-tug, ostensibly to go to Port Antonio, Jamaica. These arms and ammunition were shipped on board the schooner Erwin at pier 28, which cleared on the eighteenth of July, under secret instructions to transfer them at Hog island, near Hampton Roads, to a steamer which was to appear for them there, and receive them on concerted signals. These instructions and signals were arranged at Kearney's request and communicated to him, and he also had the general superintendence of the fitting out of the Hogan for sea. Two days afterwards we find the Hogan at pier 28, on the eve of her departure, with all her coal on board, ostensibly bound for Jamaica, like the Tropic, and with only some few stores or provisions remaining to be taken aboard, and prepared to sail in time to reach the rendezvous near Hog island. The Hogan is seized on the 20th, and no steamer or other vessel meets the Erwin near Hog island, as carefully planned, though the Erwin cruises up and down for nearly a week, and the arms, contrary to design, are carried on to Richmond. The seizure of the Hogan has apparently disconcerted the carefully devised plans of Soutar and Kearney in the purchase of a large quantity of arms, and the simultaneous purchase and fitting out of the tug. These are at least circumstances of an extremely suspicious character, and if unexplained, when explanation is in the power of the claimant, they necessitate the inference that the Hogan was the vessel designed to receive the arms near Hog island for use against Hayti. *Slaver Cases*, 2 Wall. 350, 401; *Clifton v. U. S.*, 4 How. 242.

2. No explanations, however, are offered, either as to the purchase of this large quantity of arms and ammunition, or of the failure of any vessel to meet the Erwin at Hampton Roads. If these arms and ammunition, to the amount of \$7,000 in value, had been destined for any other use than in aid of the Haytian insurrection it would have been easy for the claimant to show it; and so as

regards the vessel which was to meet the Erwin. The whole arrangement had been made at Kearney's request, and he received a copy of the instructions and signals as agent of Soutar, and could easily have shown that the Hogan was not the vessel intended to receive these arms, if such were the fact. If it were a vessel from a foreign port that was to meet the Erwin, that fact could have been shown without evidence of any violation of our law; while it is improbable in the last degree that Soutar and Kearney were at this very moment engaged in fitting out and sending from this country some other vessel than the Hogan, which does not appear in the case, to meet the Erwin at Hampton Roads. They were fitting out the Hogan; they had purchased her at the price of \$11,600, and she was about to sail at the appropriate moment to meet the Erwin, according to instructions and concerted signals clearly proved; and the inference is irresistible, in the absence of all explanation, and of proof of any other vessel designed for that purpose, that the Hogan was the vessel designed for that rendezvous, and to proceed thence to assist the Haytian insurgents. These arms and ammunition weighed but 20 tons, scarcely more than the coal she would consume on her way to Hampton Roads, and they were easily within her power to take.

3. Four witnesses testified to the direct statements of Capt. McCarthy showing that the Hogan was being fitted out to aid the insurrection; that Cox and Costigan were wanted by Capt. McCarthy because they had had experience in the navy as gunners, although he refused to tell them the name of the vessel on which he desired to ship them, it being before the Hogan was actually purchased, but while negotiations were pending for the purpose of getting some steamer; and that he told them that the vessel was going to Miragoane; that there would be fighting there; and that arms were to be transferred to him on the way. Capt. McCarthy denies this statement; and it is urged that it is extremely improbable that he would make any such disclosures, even if true. But this argument is weakened by the fact which appeared in evidence, and which to some extent fell under the observation of the court, that Capt. McCarthy, besides apparently being usually voluble in conversation, became much more so when under the influence of liquor, to which he was occasionally addicted, so as not to be restrained by the ordinary considerations of prudence and caution. Some of the statements made by him, given in evidence, were made when under the influence of liquor; and for that reason the weight to be attached to them would be undoubtedly diminished; and though the general character of the four witnesses referred to is not of the highest credibility, still all this evidence falls completely with the other circumstances of the case; and, as there is no impeachment of these witnesses, their testimony cannot be disregarded, but must be held as at least somewhat strengthening the conclusion to which all the circumstances point.

4. The improbabilities of the ostensible purpose of the *Hogan*, namely, to raise the wreck of the *Calvert* at Port Antonio, Jamaica. I do not question, upon the evidence, that Soutar had purchased this wreck for \$500, and was proposing to raise it. The *Hogan* alone would, however, be of no service in raising such a wreck. She was wholly unadapted for such a service, and incapable of doing it. The plan actually proposed for raising this wreck, as the evidence showed, was to procure two long three-masted schooners, to be placed one on each side of the wreck, with four beams running across, each furnished with a jack-screw and chains, by means of which the wreck should be raised. The *Hogan* might be made useful to some extent in merely towing the schooners into place, in towing away the wreck when raised, and serve as a convenient tender in the progress of the work; but there was no evidence that aid of a character so entirely subordinate could not be procured at Port Antonio from some other tugs at a comparatively trifling expense; and it would seem in the highest degree improbable that, for services so comparatively slight and subsidiary, Soutar should have expended \$11,600 in the purchase of the tug *Hogan*. The *Hogan*, moreover, was equipped for sea long before the other preparations for raising the wreck were made. Some negotiations for the hiring of schooners were entered into by Kearney here, but they failed, either the schooners or the price being unsatisfactory. By Soutar's letter to Kearney from Kingston, July 3rd, it appears that he arrived there from New York on the twenty-ninth of June, from which it may be inferred that he left New York immediately after the purchase of the *Hogan*, and of the arms and ammunitions above referred to. In this letter he desires that "*Calvert's* matter be put in hand as early as possible," and gives directions to have screws and beams made for use in that business if schooners are obtained. These beams or screws were not procured or shipped until August, nearly a month after the *Hogan* was ready to sail. It is manifest, therefore, that this voyage of the *Hogan* was long before there were any preparations for raising the *Calvert*, and could not have been intended for that purpose.

Again, had this been the real object of the *Hogan*, it is improbable that the case would have been left with such very loose and inadequate evidence of it. As it stands, the evidence consists only of McCarthy's statements of what Soutar told him, and of other casual statements in the course of the negotiations for the purchase of the *Hogan*. It is quite possible, and even probable, that it may have been designed to use the *Hogan* to assist in raising the *Calvert* when the other preparations were ready; so that the vague evidence of the kind referred to, though not false, is in no way incompatible with the primary and direct object of the voyage being to aid in the insurrection. If, moreover, the object of this voyage was a legitimate commercial venture, no reason appears why Soutar, having paid \$11,600 for the *Hogan*, should have the title taken and

registered in the name of Capt. McCarthy, and afterwards, by a secret bill of sale, transferred to his partner, Abbott. Nor are the character and antecedents of Capt. McCarthy such as would render it probable that he would be employed as the captain of a tug-boat to be used as a mere tender in raising the Calvert or in towing about the island; nor does the business of towing appear to form any part of Soutar's ordinary business.

The evident disguise and concealment under which the Hogan was purchased and her title taken and kept, the failure to exhibit by any direct or satisfactory proof any legitimate business at the time she was fitting out; the absence of all evidence from the parties immediately and most deeply interested, when their testimony might easily have been procured had her destination been a legitimate one; together with the strong circumstantial evidence above stated, sustained by the direct evidence of witnesses as good as could be expected to be employed in such an expedition, leave no doubt in my mind that the Hogan was fitted out for the purpose of receiving, near Hampton Roads, the \$7,000 worth of arms and ammunition which had been dispatched by the Erwin to that rendezvous two days before, and of proceeding thence to Hayti, in aid of the insurgents there in the various ways for which she was suited.

The evidence shows therefore, a hostile expedition organized and dispatched from our ports in separate parts, to be united at a common rendezvous on the high seas, and to proceed thence to Hayti, in completion of the original hostile purpose with which the different parts were dispatched from our shores. Such an expedition is as much within the prohibition of section 5283 of the Revised Statutes as if all its parts were united and complete upon one single vessel at the moment of its departure. *U. S. v. Quincy*, 6 Pet. 445; *U. S. v. Gooding*, 12 Wheat. 472; *The Meteor*, (per BETTS, J.) 245-250.

A decree for the condemnation of the Mary N. Hogan must therefore be awarded.

UNITED STATES V. TWO HUNDRED AND FOURTEEN BOXES OF ARMS, &C., and UNITED STATES V. ONE HUNDRED KEGS OF GUNPOWDER. 20 FEDERAL REPORTER, P. 50.

(February 4, 1884. District Court of U. S., Eastern District of Virginia.)

HUGHES, J. These are libels of information brought by the United States attorney, for and in behalf of the United States against two cannons, sundry cases of fire-arms and ammunition, and kegs of gunpowder, found on board the schooner E. G. Irwin, lying in the port of Richmond, and seized for forfeiture in August last. The two proceedings are founded upon section 5283 of the Revised Statutes of the United States, which, so far as applicable to this

case, provides that every person who, within the limits of the United States, attempts to fit out and arm, or is knowingly concerned in the furnishing, fitting out, and arming, of any vessel, with intent that such vessel shall be employed in the service of any foreign people to cruise or commit hostilities against the citizens of any foreign state with which the United States are at peace, shall be punished as provided by law; and that all the materials, arms, and ammunition which may have been procured for the equipment of such a vessel shall be forfeited.

The case of the prosecution is claimed to be that the steam tug Mary N. Hogan, lying in the port of New York in July last, was made ready to be sent out to the waters of Hayti to cruise and commit hostilities in those waters, as a gunboat, in behalf of the insurrectionists of that Island, against the republic of Hayti; and that the two cannons, the cases of fire arms and ammunition, and the kegs of gunpowder, which were seized on board of the Irwin under process of this court, were intended to be put upon her as her armament and outfit, and to have been taken on board of the Hogan from the Irwin at some point on the Atlantic seaboard near Hog Island or Hampton Roads; and that they were shipped at New York on the Irwin for that purpose; and that Capt. Dodd, the master of the Irwin, knew of such character and destination of this part of his cargo, and therein willingly and knowingly assisted in the attempt to arm, fit out, and furnish the Hogan, although it is conceded that he was ignorant of the particular steamer which he was thus to aid in furnishing, and of her name. The prosecution have produced evidence tending to prove, among others, the following facts, namely:

On the fifteenth day of March, 1883, an expedition left Philadelphia on the steamer Tropic, with arms and ammunition, nominally bound for Kingston, Jamaica. The steamer, instead of going to Kingston, went to the island of Inagua, lying between Hayti and Jamaica. There she took on board Gen. Bazelais, with some 75 armed men, and afterwards took on about the same number of men from an English steamer at sea. She then proceeded to the port of Marigoane, Hayti, with all men, arms, and ammunition, and landed them about daybreak, when, under the command of Gen. Bazelais, they successfully inaugurated the rebellion against the government of Hayti, which continued to maintain itself through the year 1883. This Gen. Bazelais had, before leaving Jamaica, supplied one Simon Soutar, a merchant of Kingston, with money for purchasing arms and ammunition. Those which went out on the Tropic were purchased in New York by one Henry A. Kearney, on Soutar's order, from Joseph W. Frazier, a dealer in such goods, and were shipped by Frazier to Philadelphia, and shipped by Kearney at Philadelphia on the Tropic. The master and mate of the Tropic were afterwards tried in Philadelphia, and convicted and sent to the penitentiary for the violation of section 5286 of the Revised Statutes of the

United States, of which they were found guilty. See *U. S. v. Rand*, 17 Fed. Rep. 142. Early in the summer of 1883 Soutar appeared in New York, and was in conference with Kearney, Frazer, one George W. Brown, and one Wellesley Bourke. Kearney had been vice consul of the United States, during some years before 1883, in Hayti. Afterwards he had been consul to Hayti in New York, Brown had conducted business in Jamaica, and knew Soutar, and had known Kearney for 10 years. Brown's business in New York in July last was that of an insurance agent, but he took part in the affair about to be mentioned as an outside job. Bourke was the agent of the Haytian insurrectionists in New York. A sequel of the intercourse of these men was that a steam tug called the *Mary N. Hogan*, capable of carrying some 75 tons or more in weight or freight, not in large bulk, was purchased, with money supplied by Soutar through the agency of Kearney, at a cost, all told, of \$11,600. There were also purchased by Kearney, with funds supplied by Soutar, the guns, arms, and ammunition which are the subjects of the present libels at a cost of \$7,000. They were bought of Joseph W. Frazer, the same person who had sold the light articles which had gone to Marigoane on board the *Tropic*. Kearney, wishing to keep in the background, got Brown to engage a vessel by which these military goods might be sent out of New York billed for some home port; and Brown through a regular ship-broker in New York engaged the schooner *E. G. Irwin*, Silas H. Dodd, Master, for that purpose. It was concerted between Kearney, Brown, and Dodd that after these military goods were put on board the *Irwin* and after the schooner should have proceeded down the coast for some distance, say to Hog Island or Hampton Roads, she should be hailed, by means of concerted signals, by a steamer bound from New York for Hayti, and that the munitions of war on board of her should be transferred to the steamer. Dodd, however, was not informed what steamer was to relieve him of his military cargo, or of its name.

The *Hogan*, before being purchased by Kearney for Soutar, was examined by Edward A. Bushnell, a friend of Kearney, who had sometime before been chief engineer of the Haytian Navy. John H. McCarthy, an adventurous and somewhat dissipated character, was employed as master, and the bill of sale of the *Hogan*, when purchased, was made in the name of McCarthy as owner; but he executed a mortgage for the amount of the purchase money, on the vessel, in favor of a Mr. Abbott, a merchant of Jamaica and friend of Soutar. Patrick Cox was employed as chief engineer and Finton Costigan as gunner. Several weeks were consumed in making repairs and preparations, and on the twentieth of July the *Hogan*, with a crew and a supply of coal, but without other freight, was ready to leave for her destination, when she was seized and libeled by the United States for an attempted violation of the neutrality laws, under section 5283 of the Revised Statutes. Prevented in this way, as the *Hogan* was, from proceeding on her intended voyage

there was no steamer to overhaul the schooner Irwin in her sail, down the coast, and to relieve her of the arms and military munitions which constituted part of her cargo. She had taken on pig-iron and cement at New York for Richmond at the time when she had been engaged to take the military munitions; and these latter had been consigned, as a matter of form, to "order" in Richmond. The Irwin, therefore, looked out in vain for a steamer during her voyage down the coast; and after standing off Hog Island for a couple of days, and lying at anchor in Hampton Roads for a week, she came with all her cargo, on to Richmond. Here she discharged her legitimate cargo, but was herself arrested and libeled by the government at the same time that the contraband portion of her cargo was seized.

In opposition to this train of testimony the defense deny that the Hogan was intended for warlike cruising in the waters of Hayti against that republic; insist that she was purchased for the purpose of being sent out and used in the port of Antonio, Jamaica, to raise a steamer, the Calvert, which had been sunk in the harbor there in a collision, and which had been purchased at auction, as she lay, by Soutar; and, not controverting many of the facts brought out in evidence by the prosecution, yet insist that the purchase of the arms and munitions seized on the Irwin was for the purpose of their being shipped, as commercial venture, to Jamaica, on board the Hogan. The case is the same in its principles, and substantially the same in its evidence, with that of *The Mary N. Hogan*, which was tried in the District Court of the Southern District of New York in November last, and in which there was a decree of condemnation and sale against the Hogan. The case is reported in 18 Fed. Rep. 529. The evidence was so fully discussed in the opinion of Judge Brown, delivered in that case, that I am relieved of the necessity of a minute detail of so much of it as goes to show the purpose and destination for which the steam-tug Hogan was intended. I probably have a right to regard that part of the case before me as *res judicata*; but feeling disposed, in the cases at bar, to consider the question of the character and destination of the Hogan as an original one, I have gone anxiously and thoroughly over all the voluminous evidence before me on that subject, and find myself constrained to adopt precisely the conclusions that were reached by Judge Brown, and are set forth in his opinion in that case.

Counsel for defense insists that there is no direct proof of an illegal purpose in fitting out the Hogan. That would be an insufficient objection if the circumstances were such as to leave no other reasonable hypothesis than that of her guilt, and if they pointed conclusively to that fact. But there is very much direct evidence. The chief engineer, Patrick Cox, and the gunner, Finton Costigan, of the Hogan, testified positively and circumstantially that McCarthy, the master of the Hogan, told them that they were to fight the vessel against the Haytian government; that she was going there

for that purpose; that a bounty of \$5,000 would be divided, on reaching there, between her four principal officers; and that they hired themselves for that express enterprise. Declarations of McCarthy to the same effect, made to others when off his guard from liquor, were also proved. The pretense that the Hogan was to be used in the port of Antonio to raise the Calvert is insufficient to overcome the circumstantial and positive evidence sustaining the hypothesis of the prosecution, that she was intended to be used as a gun-boat in the waters of Hayti. The Calvert cost, as she lay, \$500 or £500—the evidence seeming to be confused as to the two sums—but I suppose the true price was £500. In order to save this £500, it is pretended that Soutar went nearly a thousand miles to New York, and paid \$11,600 for a tug boat to be used for the purpose of raising the Calvert; putting on that tug boat when about to sail no sort of apparatus such as salvors employ in lifting ships from the bottom of the sea. If the raising of the Calvert had been Soutar's real object, the service of experienced wreckers provided with wrecking schooners, and wrecking pumps, anchors, cables, falls, and other expensive material such as are kept on hand only by professional wreckers, would have been sought in Havana, Savannah, Charleston, Norfolk, or New York, and employed, on a contingent compensation, to effect the raising. It will not do in an Admiralty court, accustomed to the trial of wrecking and salvage cases, to insist that a sensible man would content himself with purchasing a single steam-tug (an instrument of most subordinate utility in such an enterprise) in the expectation of raising with it an ocean steamship from the bottom of a harbor. Sunken vessels are not raised by steam tugs. All the apparatus of professional wreckers are required for the purpose. A court will generally make charitable presumptions in favor of accused persons, where there is a question of forfeiture, but I find myself unable to accept the presumption that a steam tug was bought in New York at a cost of \$12,000 for the purpose of raising a steamship from the bottom of the harbor of Antonio, Jamaica, which cost only £500, and was to be sent out for that purpose without a particle of wrecking apparatus on board, except some sort of windlass, but loaded down with military guns and ammunition. The Hogan bore less than two feet of free-board. A cargo of 20 or 30 tons, which was the weight of these munitions, would have put down her deck to within 12 inches of the water. Even on a smooth July sea, a voyage to the West Indies would have been a desperate commercial venture, and yet we hear nothing of insurance either upon vessel or cargo. Commercially, the enterprise would have been reckless. As a military venture, it was no more desperate than military raids usually are, especially upon the high seas. In short, it is impossible to read the evidence in these cases, in a judicial spirit, without being impressed with the irresistible conviction that the Hogan was bought and prepared in New York for the purpose of being sent directly to Hayti, with cannons,

gun-carriages, small-arms, ammunition, and powder, which were to be taken on board at some point on the coast from some other vessel, and with this armament was intended to be used as a gun-boat in the waters of Hayti, in aid of the insurrectionists of that island, against that republic. Technically, this question comes to me as *res adjudicata* under the decree of the District Court of the Southern District of New York, rendered on the twenty-third of November, 1883. Actually, it is proved to me by evidence which leaves room for no other conclusion.

I come, therefore, to the additional questions on which the cases at bar depend, namely: *First*, whether or not the military material which is the subject of these libels was intended to be sent out as merchandise, in a commercial venture, and destined to some point in the West Indies for sale as merchandise. If not, whether this military material was intended to be sent directly to Hayti, as the military outfit of the gun-boat Hogan, for use in the hostile and insurrectionary enterprise for which that vessel was destined. No principle of the law is more clear or well settled than that merchandise, including munitions of war, may be sold to belligerents without violating the laws of neutrality. If those munitions had been sent on a vessel of commerce, which itself was not to engage in hostile operations, for the purpose of being landed and sold in a neutral port, even to a belligerent, they could not be confiscated. The general test of contraband as to neutrals is whether the contraband goods are intended for sale in a neutral market, or whether the direct and intended object is to supply the enemy with them. If the latter is the immediate object, and the property is destined to go directly to the belligerent for his immediate use, the case is within the inhibitions of the neutrality code, and the other belligerent may confiscate. In the case at bar the question is in direct form, while the principle is identical. It concerns the furnishing, fitting out, and arming, in a neutral jurisdiction, of a vessel about to proceed directly to the theatre of hostilities, and to engage in military operations. The Hogan, as already concluded, was intended for such a purpose, and on receiving these arms was intended to be directly bound to the waters of Hayti. These military goods were not to be taken to a neutral port to be sold in open market; they were not for sale at all. They were intended to be used on that steam tug in flagrant hostilities. When they left Frazer's warehouse they ceased to be articles of commerce. They were no longer for sale. They were to be put in a covert and deceptive manner upon a vessel at sea, and to constitute her outfit for engaging in hostilities against a state with which the United States are at peace. It is useless to cite legal authorities on this subject. The law is in the form of an express statute. Its principles are plain and elementary, and need only to be stated to be comprehended and approved. It is not denied by the defense that these munitions were intended to be put upon the Hogan when she should have got fairly

out at sea. Admitting that fact, they deny that the Hogan was destined to Marigoane, and insist that she was going on a wrecking expedition to raise a steamship from the bottom of the harbor of Antonio. That pretense was rejected by the court in New York, and is emphatically rejected by this court. The Hogan was to go directly to engage in hostilities in the waters of Hayti; and these munitions were to be put upon her as her military furniture and outfit.

The only remaining question, therefore, is, did those who purchased the goods and shipped them on the Irwin, and did the Irwin's master, Capt. Dodd, know of this destination of the goods? Did they attempt to fit out the Hogan with these goods? Were they "knowingly concerned in furnishing, fitting out, and arming" the Hogan, or attempting to do so, with these goods? "Attempt to fit out and arm," "knowingly concerned in the furnishing, fitting out, and arming of any vessel with intent that such vessel shall be employed to cruise or commit hostilities against a state," etc., are the searching and comprehensive terms of the law applying to these libels. It were a waste of words, in view of the cumulative evidence in these cases, to state the proofs of the complicity of Soutar and Kearney in the purchase and preparation of the Hogan for her expedition; and of Soutar, Kearney, and Brown in the purchase, shipment on the Irwin, and intended shipment on the Hogan at sea, of the munitions mentioned in these libels. I shall perform no such act of supererogation. They made the "attempt;" they were "knowingly concerned" in it. The only question is as to Capt. Dodd's complicity; though that is not an essential part of the case. These munitions were sent from Fraser's warehouse in New York to the Irwin, which had come up to an East River wharf for the purpose of receiving them. Most of them were put on at that wharf; but the schooner fearing to lie long at that point, because of the powder on board of her, went off without receiving the remainder of the goods, and set sail down the coast. On going into the Delaware breakwater to Lewes, where the captain took on his family, the munitions which had been left were found to have been forwarded there by express, and were there taken on. There were two cannons. Some of the cases contained cannon-balls; others, ball cartridges, and others, fire-arms. Their weight became the subject of instant remark by the crew, who at once divined that, though shipped as hardware they were really arms, ammunition, and missiles of war. Capt. Dodd could not have been ignorant of their nature. The Irwin sailed on the 18th, and on that afternoon Capt. Dodd informed his able seaman, Thomas Smith, that these munitions were to go to Hayti, to be used there by the rebels against their government. He also gave the same information to his mate, Moses Monks, and directed him and Smith to be on the lookout for a steamer which was to come along bound to Hayti, and to take these munitions off the schooner. These men testified as

to the red and white flag with which Brown had provided Dodd, and that it was kept flying at the flagstaff. Dodd told them that the expected steamer would recognize them by this flag, and was to hail them by dipping her own flag three times. These men testify to their own knowledge of the hostile destination of these munitions for the Haytian rebels, and that they derived it from Capt. Dodd, and that the steamer which was to hail them was to take these munitions directly to the waters of Hayti. This evidence is direct, positive, emphatic. It is not a matter of mere inference that Capt. Dodd was knowingly concerned in an attempt to furnish, arm, and fit out a steamer, which was expected to come along-side of him, and take these munitions on board as her armament for committing hostilities against the government of Hayti. That Capt. Dodd did not know what particular steamer this was to be is immaterial. If a black steamer, sailing under a black flag, without name or home port, had come alongside of him at night, and, on complying with concerted signals, had taken these munitions on board and sailed off, without his being able to learn her name or identity, and she was proved to be destined, with Capt. Dodd's knowledge, on such an expedition as that for which the Hogan was intended, Capt. Dodd's guilty participation in this enterprise would have been no greater than it was in respect to the steamer Hogan, which was equally unknown to him. If the claimant, Soutar, and his agent, Kearney, were engaged in the attempt, by shipping them down the coast on the Irwin to put these munitions on the Hogan to be used on her in committing hostilities in Hayti, I do not know that it is necessary to establish a guilty knowledge of their scheme in Capt. Dodd. He might be innocent, though the goods were guilty; but whether necessary to the condemnation of the goods or not, I hold that the guilty knowledge and participation in the plot is clearly established against Capt. Dodd by the evidence. It is useless for me to reiterate what has so often been ruled in principle, that the placing of these goods directly on the Hogan, by those knowingly concerned in fitting out that vessel, was not necessary to justify the condemnation of the goods. If they had passed through the hands of many draymen, and other intermediaries, and over many decks, before reaching the vessel whose outfit and armament they were intended to be, that ultimate destination made them guilty goods, and subjected them to condemnation.

I will sign a decree of condemnation and sale in both of these cases.

THE CITY OF MEXICO. 28 FEDERAL REPORTER, P. 148.

(April 19, 1886. District Court of U. S., Southern District of Florida.)

LOCKE, J. :

The second libel is for forfeiture for the violation of a municipal statute embodied in Section 5283, Rev. St.

It is claimed in behalf of the respondent that, if one libel is dismissed, such dismissal necessarily precludes an examination of the other, upon the principle of election or choice of action against the thing. But these libels, although against the same vessel, found under peculiar circumstances, are in no way based upon the same cause of action. The libel for prize is founded upon the law of nations and depends for proof upon the facts of her acts upon the high seas; the libel for forfeiture is for the violation of a municipal statute, and depends upon a set of facts and circumstances entirely different from that of piratical aggression. The offenses charged are separate and distinct, and the cause of action is in nowise the same. In *U. S. v. Weed*, 5 Wall. 62, and *The Watchful*, 6 Wall. 91, the same question is directly settled.

The libel for forfeiture alleges that certain persons were knowingly concerned in the furnishing and fitting out of said vessel, with the intent that she should be employed to cruise or to commit hostilities against the people of the state of Honduras, with whom the United States is at peace. The peace existing with the state of Honduras may be judicially recognized, and there only remains the questions of knowingly furnishing and fitting out of said vessel, and the intent with which she was fitted out.

The terms "furnishing" and "fitting" have no legal or technical meaning which requires a construction different from the ordinary acceptance in maritime and commercial parlance, which is to supply with anything necessary or needful. That by the furnishing and fitting out is intended something different from the arming, is not only apparent from the language of the statute, but it has been judicially determined in *U. S. v. Quincy*, 6 Pet. 445. This vessel was furnished and fitted out, in the usual acceptance of the terms, provided with the necessary supplies, and put in a condition for proceeding to sea, within the United States. Whether she was well furnished or thoroughly fitted out is not the question, if she was so supplied as to proceed on her way. She was furnished with the ordinary engineer's supplies and steward's stores, and sailed from New York the Twenty-second of December, 1885. What was the intent with which she was fitted out, and either dispatched or taken on her way by the parties in charge, becomes a most important and difficult question, involving conclusions both of law and fact.

Whatever may have been the intention of the legislators regarding the particular class of hostilities they were desired to prevent, all we have to decide from is the language with which they have

clothed their ideas, and this is broad enough to include all classes of hostilities. It has been ably argued that unless the vessel is so armed that she herself can be the offending party or thing, or, in other words, carries such an armament as can throw projectiles from her port, or is equipped as a man-of-war or armed vessel, the statute will not apply. The terms "peaceful" and "warlike," "friendly" and "hostile," are thoroughly recognized; and the line so plainly marked between what should be the course and conduct of a vessel engaged in a peaceful commercial venture, and one fitted, prepared, and intended for hostilities, is so distinct and well defined as to permit no mistake, nor require a reference to a judicial decision.

A peaceful act, a peaceful voyage, cannot be a hostile one; nor can acts looking towards war or enmity escape from the general term "hostilities." It is true that vessels may frequently be engaged in transporting troops as passengers, and war material as freight, without themselves having any connection with the actual hostilities contemplated, so that their voyages in no way partake of the nature of hostile acts, nor they be liable to be charged with the commission of hostilities. *The Lafayette* and *Ville le Paris* cited in Hall, Int. Law. 564. Or where troops, conveyed as passengers only, are landed as such, although bound on a hostile expedition, where all connection and relation existing between them and the vessel are to be terminated at their leaving her side, the question becomes one of more difficulty. But when it is intended that a vessel shall herself be part and portion of a hostile expedition; that she shall carry troops, not for the purpose of making quiet and unopposed landing, and leaving them to take the risk of war subsequently, but making for them, or with them, if found necessary, a forcible and hostile landing; standing ready to put them on shore, or receive them on board defeated; to convey and furnish them with arms, ammunition, and stores; to act as a base of supplies and operations, ready to assist in committing any hostile acts that can be completed by armed men, she sharing all chances of success or defeat, and under the direct orders and control of the commander of a hostile expedition—it cannot be admitted that her acts would be anything but hostilities. A vessel is a passive instrument, and is but made the means of success; and it matters but little, in the effect of her hostilities, whether she throw shot and shell from her ports, or dispatch boat-loads of armed men from her gangways.

It has been conclusively determined that it is not necessary that the vessel be armed or manned for the purpose of committing hostilities before leaving the United States, if it is the intention that she should be so fitted subsequently. *U. S. v. Quincy, supra*. So there need be no evidence of such arming or manning.

The intention of parties charged with a crime, when the intent is the gist of the offense, is the most difficult of all matters to prove,

and in a vast majority of instances, like the present, can only be shown by a chain of circumstances fitting into each other, against every point of which may be expected the denial of all parties in interest, either positive and direct, or as nearly so as the respect for an oath and the ingenuity of the witness will permit.

This vessel, ostensibly owned by Christian B. Hollander, of New York, sailed December 22, 1885, from New York for Central America, having for cargo about 7,000 bags of corn. She was cleared for Progreso, Blewfields, and Corn Island, and had as passengers Gen. Emilio Delgado, Col. Manuel Moray, Mariana Soto, and 17 others, who were going at the expense and in the employ of Gen. Delgado. The master was intrusted with a bill of sale of the vessel to Gen. Delgado, and a power of attorney to execute it at any time. He also had a letter of instructions, directing him that, after he should have discharged his cargo of corn at Progreso, he should receive his orders from Gen. Delgado, who accompanied him, should visit such ports or places, take such cargoes or such passengers from and to such ports or places as he (Delgado) should direct. Before leaving New York there were several cases of merchandise taken on board; but, after inspection by officers of the custom house, they, which proved to be a cannon, with carriage, furniture, and ammunition, were taken out, and, when the vessel sailed, left behind. It is testified to directly by a number of the crew that while on the voyage Col. Moray and several of the passengers openly spoke of their plans of the voyage; saying that they were going on an expedition to Honduras, and were to fight; that they were going to receive arms from another vessel, and were going first to capture Ruatan; and that the steamship was going to cruise between this island and the mainland to cut off communication. When they reached Progreso, Col. Moray (who next to Gen. Delgado seemed to be in charge of the company) requested the purser or steward to get men, telling him they were to go to Honduras to fight for Gen. Delgado. They took on board eight passengers at Progreso, who came on Gen. Delgado's account, and spoke of their being soldiers, and showed their wounds and scars. The ship proceeded to Belize, where they took on board 10 or 11 men, also on Gen. Delgado's account, and under his control, one of whom declared himself employed as pilot in Honduras waters, but no cargo. Thence they proceeded to Blewfields, then Corn island, at both of which places they remained some time; several of the party saying that they were waiting for arms and ammunition expected by the steamer Neptune; but finally, she not arriving, they cleared for Kingston, Jamaica, by way of St. Andrews. At the several ports she visited, the authorities forbade the landing of passengers on account of their rumored character and business; and finally at St. Andrews the crew made a formal protest before the consul agent against proceeding further in her, and after a hearing and investigation before the consul, Commander Chester, commanding

the United States ship *Galena*, was advised by him that the circumstances would justify the seizure.

There were found on board, not belonging to them, three flags, blue and white, with five stars, resembling the Honduras flag; bird's eye views of Ruatan, Truxillo, and other places in Honduras, showing particularly all defenses and fortifications; also maps showing principal cities, town, and roads; several revolvers; three swords; and in possession of Gen. Delgado a case of surgical instruments and bandages, two sets of field telegraph instruments, 10 half barrels of beef, and 100 barrels of flour, which were claimed as the property of Delgado, and bore the same shipping marks as the cannon and ammunition taken from the vessel before leaving New York. At Blewfields, Gen. Delgado drew \$4,000 in silver, part of which had been disbursed for the expenses of the ship. The rest was on board.

These are circumstances connected with the vessel herself and her voyage. Much of the conversations in regard to the future use of the vessel, and the intentions of the parties, has been denied with more or less directness. The defense is that Gen. Delgado held a grant or concession of a large tract of land on the Rio Coco, Nicaragua, and that the expedition was to be one for colonization and agricultural purposes, rather than hostile; that the passengers and parties employed at Merida and Belize were agricultural laborers, and not soldiers; and that their final intended destination was Blewfields; but their not being permitted to land interfered with their plans, and brought about the final suspicious circumstances. Were there no other circumstances connected with the case that bore upon it, perhaps, in the leniency of courts, and the disinclination to enforce forfeitures, such view might be accepted; but there were chains of evidence leading to the City of Mexico from another direction.

It appears in evidence that before the vessel left New York, Mr. Marks, a member of the firm of Straus & Co., the agents of the vessel in that city, and through whom all the business was transacted, procured from Mr. Jex, of the firm of Wm. Jex & Co., who had permanent business relations, and a resident agent at Corn island, a letter introducing Gen. Delgado to their agent, Capt. Nelson, at Corn island; and upon the strength of that letter advised him that they (Straus & Co.) had advised their agent at Kingston to ship to him some goods which they requested him to hold at the disposal of Mr. Delgado for reshipment per City of Mexico or otherwise; and, when confronted by Mr. De Long, of the same firm, regarding this letter, admitted that they had purchased the arms, and shipped them to Kingston, intending they should be landed at Corn island, and explained that it was but a friendly turn to ex-President Soto, who had employed them to purchase the arms and City of Mexico, in which business they only acted as agents. There is an attempted contradiction or denial of a portion of this by Marks; but, in view

of his false testimony when first before the commissioner, in which he denied that he knew of Delgado, when the proof is positive that he made application to Mr. Jex for a letter of introduction, and explained that he would not need any money, there can be no question as to which witness to believe. This explains what goods he was to ship to Delgado at Corn island; and why they were not received is explained by the testimony of A. D. Straus, of the same firm, who states that this cannon and ammunition put ashore from the City of Mexico was afterwards shipped by a steamer of the Atlas Line, consigned to order at Kingston, but was returned by another vessel of that line because the government would not allow arms to remain there by special permit. After the return of the arms from Kingston, the next attempt to forward them to the City of Mexico we find undertaken by the Norwegian steamer Fram, chartered by Lord & Austin for 40 days to carry a load of arms and ammunition to deliver to order at St. Andrews, Corn island, or Blewfields, calling at Turks Island on the way out to get some laborers, presumably to take along with the arms. The master of the Fram is not, under the circumstances, to be presumed to know where the arms were going; but one of these laborers, James Bogan, who had been sent ahead to Turks Island by the Santo Domingo, testifies that he was to wait at Turks Island, to be shipped thence on the Fram, and from the Fram to the City of Mexico, where he was to report to Gen. Delgado. He tells the same story in his testimony about the intended attack upon Honduras, with some exaggerations, but with no communication with any of the crew of the City of Mexico, nor any inducement that I can perceive for false swearing. The Fram proceeded to St. Andrews, Corn Island, and Blewfields, but in the mean time the City of Mexico had been seized, and was on her way to Key West, and consequently the order to whom the arms and ammunition were consigned was not found, and they were returned and left at Kingston. Before the City of Mexico left New York it was intended to have goods sent her, to be received at Corn island by Gen. Delgado. If they were not the arms and ammunition, what prevented their being regularly shipped, and why not received? If Gen. Delgado's voyage was to terminate at Blewfields, and he was to proceed from there to Rio Coco, why were his goods shipped to Corn island? If he was, in good faith, attempting to colonize a large tract in Nicaragua, had he not enough influence with the authorities to obtain permission to land at their only seaport. But one conclusion can be arrived at; the City of Mexico was intended for receiving arms at Corn island, or St. Andrews; and, under the order of Delgado, was waiting for them, whether they came in the Neptune or some other vessel.

What were the intentions for her future course? Bogan says that he was told they were to make an attack on Honduras. It is urged that Bogan has not been connected with the City of Mexico sufficiently to make his testimony relevant; but I

think the combination of circumstances proven shows that he was employed or hired to join her on the expedition, under leaders engaged in the same enterprise and the declaration of such parties may be considered. The crew of the City of Mexico say that those partially in command of a part of the expedition openly announced the intention to attack Honduras. Although not in Honduras waters, nor to go there on any legitimate voyage, they had employed a party who declared himself to be a Honduras pilot. They had bird's eye views of the fortifications and places along the coast of Honduras. The whole character of the voyage shows it was not a commercial one. No cargo was taken, no cargo looked for,—only arms and ammunition, which are not the implements of peaceful colonization or agriculture. The arms were not shipped or to be received for sale as a financial speculation. There was no war in that part of the world going on or in contemplation, except what was intended by Gen. Delgado, for whom they were intended.

I can arrive at but one conclusion: that acts of hostility were contemplated and intended at the time of furnishing and fitting out the City of Mexico, in which she was to take an active part, and that it was intended that she should receive arms and ammunition, and, in the language of the statutes, she should commit hostilities.

The decree of forfeiture must follow.

UNITED STATES V. YBANEZ. 53 FEDERAL REPORTER, P. 536.

November Term, 1892. Circuit Court of U. S., Western District of Texas.

Indictment against Carmen Ybanez for violation of the neutrality laws by setting on foot a military expedition against the republic of Mexico. Verdict "Guilty," and sentence of three years in the penitentiary.

H. A. EVANS, for the United States.

W. C. COX, for defendant.

MAXEY, District Judge, (charging jury). The indictment contains two counts. In the first count it is charged that the said Carmen Ybanez did, on the 19th day of December, 1891, within the western district of Texas, and within the territory and jurisdiction of the United States, unlawfully begin a certain military expedition, to be carried on from thence against the territory and dominion of the republic of Mexico; the said United States being then at peace with the state and the people of the said republic of Mexico. The second count charges that the said defendant did, on the 19th day of December, 1891, within the western district of Texas, and within the territory and jurisdiction of the United States, unlawfully, and with force and arms, set on foot a certain military enterprise, to be carried on from thence against the republic of

Mexico; the said republic of Mexico being at peace with the United States. The statute upon which the indictment is predicated reads as follows:

"Every person who, within the territory or jurisdiction of the United States, begins or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, shall be deemed guilty of a high misdemeanor," etc. Rev. St. § 5286.

The law has been carefully considered by Judge Judson in the case of the *United States v. O'Sullivan*, 9 N. Y. Leg. Obs. 257. His views, in the main, I will adopt, and give to you in charge, in this case.

Before the jury can convict on this indictment, it must be proved to their satisfaction that the expedition or enterprise was, in its character, military; or, in other words, it must have been shown, by competent proof, that the design, the end, the aim, and the purpose of the expedition or enterprise were some military service,—some attack or invasion of another people or country, state or colony, as a military force. The engagement of men to invade or attack another people or country by force and strong hand; the designation of officers or leaders; the classification and arrangement of men in regiments, squadrons, battalions or companies; the division of men into infantry, cavalry, or riflemen; the purchase of military stores, such as powder or ball, for an expedition,—gives character to the expedition itself, provided there is sufficient proof to satisfy the jury that they are to be used. But any expedition or enterprise in matters of pleasure, commerce, or business, of a civil nature, unattended by design of an attack, invasion or conquest, is wholly legal, and is not an expedition or enterprise within this act. To constitute an offense under the law, there must have been a hostile intention connected with the act of beginning or setting on foot the expedition or enterprise. This intended hostility, or this intended physical movement, characterizes the beginning or setting on foot and expedition. The one makes it military; the other not. How this distinctive character shall be shown depends upon the proof. The mere fact that men, armed with rifles, and supplied with ammunition, crossed the Rio Grande river from the territory of the United States into Mexico, would not be sufficient, of itself, to constitute a military enterprise with hostile intent; and we should require proof what they were to do, and what their destination was. Without such qualifying proof, the expedition might still be lawful; but with it, its military character might be established. The object of the expedition is an important thing to be considered. A specious covering, an artifice, secret movements, or deceptive proceedings may aid somewhat in fixing the true character or nature of the act. The term "expedition" employed in the statute, is used to signify a

march or voyage with martial or hostile intentions. The term "enterprise" means an undertaking of hazard; an arduous attempt. "Begin" is to do the first act; to enter upon. We may say with all propriety, that to begin an enterprise is to take the first step, the initiatory movement of an enterprise, the very formation and commencement of an expedition. To "set on foot" is to arrange; to place in order; to set forward; to put in the way of being ready. After these proof are made out, the prosecution must further show that the beginning, the setting on foot, of such expedition or enterprise was within the territory or jurisdiction of the United States, and to be carried on from thence against the territory or dominion of the republic of Mexico. That the United States are at peace with Mexico is a fact well known, and does not require proof. You will see, by careful attention to this law, that there are certain acts which are declared to be unlawful, and which are prohibited by the statute, to wit, to begin an expedition; to "set on foot" an enterprise, the expedition or enterprise, in either case, having reference to one of a military character.

It is not necessary that both of these distinct provisions shall be violated, to constitute the offense. The proof of either one of them will be deemed sufficient. They are put in the alternative. It is not essential to the case that the expedition should start, much less that it should be accomplished. To "begin" is not to finish; to "set on foot" is not to accomplish. The language of the statute is very comprehensive and peremptory. It brands as an offense against the government the first effort or proposal by individuals to get up a military enterprise in this country against a foreign one. It does not wait for the project to be consummated by any formal array or organization of forces, or declaration of war, but strikes at the inception of the purpose, in the first incipient step taken with a view to the enterprise, by their engaging men, munitions of war, means of transportation, or funds for its maintenance. 2 Whart. Crim. Law, (5th Ed.) pp. 519-525. This statute does not require any particular number of men to band together to constitute the expedition or enterprise one of a military character. There may be divisions, brigades, and regiments, or there may be companies or squads of men. Mere numbers do not conclusively fix and stamp the character of the expedition as military or otherwise. A few men may be deluded with the belief of their ability to overturn an existing government or empire, and laboring under such delusion, they may enter upon the enterprise. Now, if a few men, whether 25, 50, or 200, "begin" or "set on foot," within the territory or jurisdiction of the United States, a military expedition or enterprise, to be carried on from thence—that is, from the territory or jurisdiction of the United States—against the republic of Mexico, they would be guilty of an offence against the statute. The proof must establish in your minds the fact that the expedition or enterprise was of a military character; and when the evidence shows

that the end and object were hostile to or forcible against the republic of Mexico, then it would be, to all intents and purposes, a military expedition. Again, the prosecution is bound to prove that the act of beginning or setting on foot a military expedition or enterprise was within the territory or jurisdiction of the United States; and you are instructed, in this connection, that the western district of Texas is within the territory and jurisdiction of the United States. And the proof must further show the expedition or enterprise was to be carried on from the territory or jurisdiction of the United States against the republic of Mexico.

1. From the evidence, you must be satisfied, beyond a reasonable doubt, that the defendant began a military expedition, or set on foot a military enterprise, in the western district of Texas, to be carried on from thence against the republic of Mexico.

2. The proof must establish in your minds that the expedition or enterprise was a military expedition or enterprise, and evidence showing that the end and objects were hostile to or forcible against a nation at peace with the United States characterizes it, to all intents and purposes, as a military expedition or enterprise.

3. You must be satisfied from the evidence that the defendant did begin a military expedition, set on foot a military enterprise, as charged in the indictment, or was present, actively aiding and abetting in the commission of the offense, before you can return a verdict against him.

In reaching a conclusion as to the guilt or innocence of the defendant, you will consider all the facts and circumstances in evidence before you. A criminal offence may be established or proved by circumstantial evidence as well as by direct testimony. But, "when the prosecution, in a criminal case, relies upon circumstantial evidence,—that is, upon proof of the facts or circumstances which are to be used as a means of arriving at the principal fact in question,—it is a rule that these facts or circumstances must be proved, in order to lay the basis for the presumption which is sought to be established. Each circumstance essential to the conclusion must be proved to the same extent as if the whole issue rested upon the proof of such essential circumstance." In a case depending upon circumstantial evidence—and the government here partly relies upon evidence of that character—the rule is that—first, "the hypothesis of delinquency or guilt of the offense charged in the indictment should flow naturally from the facts proved, and be consistent with them all; and, second, the evidence must be such as to exclude every reasonable hypothesis but that of guilt of the defendant of the offense imputed to him; or, in other words, the facts proved must all be consistent with, and point to, guilt only, and must be inconsistent with innocence."

It is insisted by the defendant that certain witnesses who testified for the government were active participants in the crime charged against him, and that, therefore, their testimony standing

alone and uncorroborated by other evidence which connects the defendant with the offense imputed to him, is insufficient to justify a conviction. You can readily recall the names of those witnesses who testified to their connection with the movement designated by them as the "Garza Expedition." some of them are, by their own statements, clearly accomplices, while at least two others claim that they were captured by Garza's men, and compelled to join the expedition under the pressure of force and threats of violence. If any of the witnesses testifying in the case were constrained or compelled to go with, and remain in, the expedition, because of violence, or threats of violence, offered to them by men engaged in the enterprise,—that is, if they did not join and remain with the expedition voluntarily, but were compelled to do so by men engaged therein—then they would not be regarded in law, as accomplices; for an accomplice is a voluntary assistant in crime. "He is a person who knowingly and voluntarily, and with common intent with the principal offender, unites in the commission of an offense." Bearing in mind this distinction between a person who is an accomplice and one who is not, you are further instructed that whether the testimony of an accomplice be true or false is a question which, like all controverted questions of facts, is submitted solely to you to determine for yourselves. It is not within the province of the court to pass upon controverted questions of fact, or upon questions affecting the credibility of witnesses. But it is the duty of the court to call your attention to certain rules which obtain in courts of justice in reference to these persons known in law as "accomplices." On this point you are instructed "that a particeps criminis,—that is, an accomplice,—notwithstanding the turpitude of his conduct, is not on that account an incompetent witness." It is the settled rule in this country that an accomplice in the commission of a crime is a competent witness, and the government has the right to use him as a witness. It is the duty of the court to admit his testimony, and that of the jury to consider it. The testimony of an accomplice is, however, always to be received with caution, and weighed and scrutinized with great care by the jury; and it is usual for courts to instruct juries—and you are so instructed in this case—not to regard the evidence of an accomplice unless he is confirmed and corroborated in some material parts of his evidence connecting the defendant with the crime, by unimpeachable testimony. But you are not to understand by this that he is to be believed only in such parts as are thus confirmed, which would be virtually to exclude him, inasmuch as the confirmatory evidence proves, of itself, those parts it applies to. If he is confirmed in material parts connecting the defendant on trial with the offenses charged in the indictment, he may be credited in others; and the jury will decide how far they will believe a witness, from the confirmation he receives by other evidence; from the nature, probability, and consistency of his story;

from his manner of delivering it, and the ordinary circumstances which impress the mind with its truth. U. S. v. Kessler, Baldw. 22; U. S. v. Beeves, 38 Fed. Rep. 409, 410. With the rules above announced for your guidance, you will give to the testimony of such witnesses as have been shown to be accomplices such weight as you consider it entitled to receive.

* * * * *

It is said, gentlemen of the jury, by the learned judge from whose charge I have already quoted, that—

“The all-pervading object of this neutrality law is peace with all nations,—national amity,—which will alone enable us to enjoy friendly intercourse and uninterrupted commerce, the great source of wealth and prosperity; in short, to prevent war, with all its sad and desolating consequences.”

Such being the object of the law, it is the duty of the courts and juries to enforce it, whenever the occasion arises, with fairness and impartiality, but fearlessly and with firmness. While our own government affords protection and a safe asylum to honest, upright, and liberty-loving people, it has a right to demand, on their part, obedience to law and respect to our international obligations; and although a citizen or other person living under the influence of American institutions may enjoy the utmost liberty, consistent with public order, yet that liberty is a liberty regulated by law. It is not an unrestrained license, conferred upon an individual to violate the law with impunity, and thus produce anarchy at home, or as the case may be, imperil the amicable relations which may subsist between our own government and that of a friendly foreign power. Men must obey the law, else the social fabric falls. Independent states and nations must discharge their international obligations to each other, if they desire the maintenance of peace and the continuance of friendly intercourse. The evidence in this case makes it manifest that the executive department of the federal government, with the active assistance and co-operation of the state authorities, has performed its duty in the endeavor to prevent a violation of the neutrality laws, by dispersing armed bodies of men, who, from the inception of the Garza movement until recently, infested the lower portion of this judicial district, and by aiding in the arrest of numerous persons supposed to be offenders against the statute. Let us, also, gentlemen, perform the duty assigned to us. The defendant now on trial is charged with a violation of this law, and it is for you to say whether he is guilty or innocent of the offense. Give the case a fair, candid and impartial hearing. If he be innocent, do not hesitate so to declare. But if, under the evidence and foregoing instructions, you deem him guilty, then so say by your verdict. The case is now remitted to your keeping. Take it, and render such a verdict as may be just both to the government and the defendant.

1 In the Supreme Court of the United States. October Term,
1892.

In the matter of the application of the United States for a Writ of Certiorari, under the Act of March 3, 1891, in the case of the United States, Appellants, *vs.* The Steamship *Itata*, her tackle, apparel, furniture, etc. Now pending in the United States Circuit Court of Appeals for the Ninth Circuit.

[Petition for Writ.]

To the Honorable the Supreme Court of the United States :

And now, October 17, 1892, comes the United States, by W. H. H. Miller, Attorney-General, and respectfully shows and gives the court to understand and be informed :

First. That at the January term, A. D. 1891, of the district court of the United States in and for the southern district of California there was filed, in the name and behalf of the United States, a libel of information against the steamship *Itata*, her tackle, apparel, and furniture, etc., by which it was shown to the said court that on the 8th day of July, A. D. 1891, and on waters which were navigable from the sea by vessels of 10 or more tons burden, the United States marshal for the southern district of California had, at the port of San Diego, in the State of California, and within the said southern district, seized the steamship called *The Itata*, and then had the same in his custody in the said port of San Diego, as being forfeited to the United States for the following reasons, to wit :

“For that therefore, to wit, on the 8th day of May, 1891, within the limits of the United States, and upon waters of the Pacific Ocean, navigable by vessels of ten tons burden and upwards, and within the jurisdiction of the United States and within two miles of the island of San Clemente, an island within the limits of the State of California and within the jurisdiction of this court, one Pedro Mannzen, and divers other persons unknown, did unlawfully fit out and arm said steamship or vessel called the *Itata*, with intent that such steamship or vessel should be employed in the service of certain foreign people, viz., certain inhabitants and citizens of the Republic of Chili, then organized and banded together in large numbers and in great force, and engaged in open armed hostilities and attempted revolution against the Republic of Chili and the lawful government thereof, said insurgents being known as the Congressional party, to cruise and commit hostilities against the citizens and property of a foreign State, viz., the Republic of Chili, with which republic the United States were then and now are at peace, contrary to the form of the statute in such case made and provided ; whereby, by force of the statute in such case made and provided, the said steamship *Itata*, her tackle, apparel, and furniture became and are forfeited to the uses in said statute prescribed.

"And also, for that theretofore, viz., on the 8th day of May, in the year 1891, within the limits of the United States, and on waters of the Pacific Ocean navigable by vessels of ten tons burden and upwards, within the jurisdiction of the United States and within about two miles from the island of San Clemente, an island in the Pacific Ocean within the limits of the State of California, in said southern district, and within the jurisdiction of this court, one Pedro Mannzen, and divers other persons unknown, were unlawfully concerned in the furnishing and fitting out of a certain steamship or vessel called the *Itata*, with intent that such vessel should be employed in the service of certain foreign people, viz., certain inhabitants of the Republic of Chili, there organized and banded together in large numbers and in great force, and in open armed hostilities and insurrection against the said Republic of Chili and the lawful government thereof, said insurgents being known as the Congressional party, to cruise and commit hostilities against the citizens and property of a foreign State, viz., the Republic of Chili, with which the United States then were and now are at peace, contrary to the form of the statute in such case made and provided; whereby by force of the statute in such case made and provided, the said steamship or vessel called the *Itata*, her tackle, apparel, and furniture have become and are forfeited to the uses of said statute provided.

4 "And also for that theretofore, viz., on the 6th day of May, 1891, within the limits of the United States, viz., at the port of San Diego, in the State of California, in said southern district, and within the jurisdiction of this court, one Pedro Mannzen, and divers other persons unknown, were unlawfully concerned in the fitting out and furnishing of a certain steamship or vessel called the *Itata* with the intent that such vessel should be employed in the service of certain foreign people, viz., certain inhabitants of the Republic of Chile, then organized and banded together in large numbers and great force, and engaged in open armed hostilities and attempted revolution against the said Republic of Chile and the lawful government thereof, and known as the Congressional party, to cruise and commit hostilities against the citizens and property of a foreign state, viz., the Republic of Chile, with which Republic the United States then were and now are at peace, contrary to the form of the statute in such case made and provided, whereby, by force of the statute in such case made and provided, the said steamship *Itata*, her tackle, apparel, and furniture, have become and are forfeited to the uses in said statute prescribed."

Second. That thereafter, upon due monition and citation issued and proceedings had, appearances were entered and answers filed by divers persons laying claim to the said ship, her tackle and furniture, etc., and a trial had with the result that the libel was dismissed by the court.

Third. That upon the trial of said libel of information the court found the facts as follows:

“In January of 1891 the steamship *Itata* was an ordinary merchant vessel. Early in that month she was captured in the harbor of Valparaiso, Chile, by the people then known as the Congressional party, and who were then engaged in an effort to overthrow the then established and recognized government of Chile, of which Balmaceda was the head. The *Itata* was by the Congressional party put in command of one of its officers, and was used in their undertaking as a transport to convey troops, provisions and munitions of war, and also as a hospital ship and one in which to confine prisoners. Four small cannon were also put upon her decks, and she carried a jack and pennant. Some time prior to the following April one Trumbull came to the United States as an agent of the Congressional party, and about the month of April went to the city of New York, and there bought from one of the large mercantile firms of that city dealing in such matters 5,000 rifles and 2,000,000 cartridges therefor, with the intention and for the purpose of sending them to the Congressional party in Chile for the use in their effort to overthrow the Balmacedan government.

“The sale and purchase of the arms and ammunition were made in the usual course of trade. Trumbull caused them to be shipped by rail to San Francisco, and engaged one Burt to accompany them, which he did. Arrangements had been made by Trumbull with his principals in Chile, by which they were to send a vessel to the United States to get the arms and ammunition, and convey them to Chile for the use of the Congressional party there. The *Itata* was dispatched by that party for that purpose, and was accompanied as far as Cape San Lucas by the *Esmeralda*, a warship, then in the service of the Congressional party. Before leaving Chile the *Itata* discharged the four small cannon, with the ammunition therefor, that she had theretofore carried, but she retained one small brass gun, which she had always carried and used as a signal gun, and also eight or ten old muskets and one small iron cannon, for which there was no ammunition. At

one of the Chilean ports the *Itata* took on board some soldiers, with their arms, not exceeding twelve in number, but they were taken not to be used as soldiers, but for passing coal and as stokers.

“At San Lucas the captain of the *Esmeralda* took command of the *Itata*, and the captain of the latter was left there in command of the *Esmeralda*. The *Itata* then proceeded to San Diego, really in command of the *Esmeralda*'s captain, but ostensibly in command of another, who represented to the customs officers at that port that she was an ordinary merchantman, and was bound to some port on the northern coast. Before coming into the port of San Diego, or into the waters of the United States, the *Itata* hauled down her jack and pennant, the brass and iron cannon were removed from

her deck and stowed in her hold, as were also the arms of the soldiers she carried; and their uniforms, as well as those of the officers, were removed, and all appeared in civilians' dress. At that port she laid in stores of coal and provisions, all of which were bought in the open market, and some of which were marked *Esmeralda*.

"Meanwhile Trumbull had chartered a schooner, called the *Robert and Minnie*, in San Francisco, to take the arms and ammunition from there to a point in this judicial district, then expected to be near the island of Catalina, where she could meet the *Itata*, and deliver them on board of her, to be conveyed to Chili for the purposes already stated. The schooner *Robert and Minnie*, accordingly took on board the arms and ammunition at the port of San Francisco, and in charge of Burt, proceeded to the neighborhood of

7 Catalina Island, where she expected to meet the *Itata*. In the meantime the suspicion of some of the officers of the

United States that the neutrality laws were being violated was aroused, and the marshal of this district was directed by the Attorney-General to detain the *Itata*, if such was found to be the case; and, acting upon those and certain instructions from the district attorney of this judicial district, he went on board the ship at San Diego and put a keeper in charge of her, and then went in search of the *Robert and Minnie*, which he did not find in the waters of the United States.

"Communication was, however, had between the *Itata* and the schooner, and a point near San Clemente Island was fixed upon as the place of meeting for the purpose of transferring the arms and ammunition from the schooner to the ship. Accordingly, the *Itata*, on the 6th day of May, 1891, without obtaining clearance papers, and against the protest of the person left on board and in charge of her by the marshal, weighed anchor and steamed out of the harbor of San Diego with him on board, to meet the *Robert and Minnie*, and receive the arms and ammunition. The marshal's keeper was, however, put ashore at Point Ballast before leaving the harbor. While steaming out of it one or both of the *Itata's* cannon were brought on deck and some of the soldiers appeared in uniform.

"On the 9th of May the *Itata* and *Robert and Minnie* came together about a mile and a half southerly of San Clemente Island in this judicial district, and then the arms and ammunition in question were taken from the schooner and put on board the ship in original packages, and the latter at once left with them for Chile. On September 4, 1891, the Congressional party was recognized by the Government of the United States as the established and only Government of Chile. Prior to that time there had been no recognition

8 of that party by this Government other than that, on March 4, the Secretary of the Navy cabled Admiral McCann 'to proceed to Valparaiso, and observe strict neutrality, and take no part in troubles further than to protect American interests.'

"On March 26 the Secretary the Navy cabled Admiral Brown who had superseded Admiral McCann, 'to abstain from proceedings in the nature of assistance to either, that is, the Balmaceda or Congressional party; that the ships of the latter were not to be treated as piratical so long as they waged war only against the Balmaceda government.' On April 25 Secretary of State Blaine cabled the American minister, 'You can act as a mediator with Brazilian minister and French *chargés d'affaires*.' On May 5 Minister Egan cabled this government, 'Government of Chile and revolutionists have accepted mediation of the United States, Brizil, and France most cordially; those of England and Germany declined.'

"On May 7 Acting Secretary of State Wharton acknowledged the dispatch of Minister Egan and 'expressed hope that through combined efforts of the Governments in question the strife which has been going on in Chile may be speedily and happily terminated.' On May 14 Acting Secretary of State Wharton cabled Minister Egan that, 'French minister reports threats to shoot the insurgent envoys by Balmaceda,' and directed that they should have ordinary treatment under flag of truce."

—which facts for the purpose of this motion, are assumed to be the facts of said case.

Fourth. A decree was entered in accordance with the order dismissing such libel, from which decree an appeal was taken and perfected in behalf of the United States to the United States
9 Circuit Court of Appeals for the Ninth Circuit, for the October term, A. D. 1892, thereof, where said case is yet pending and undetermined.

Fifth. It is held by the court below that the purchase of arms and munitions of war within the limits of the United States by an agent of insurgent or revolutionary forces against a State or people with whom the United States are at peace, and the delivery of such arms and munitions of war to a ship controlled, officered, and manned by such revolutionary forces, having cannon and soldiers on board, and sent to receive such arms and munitions of war within the limits of the United States, pursuant to arrangements between the insurgents and the purchasing agent, is not a violation of any law of the United States or of the duty of the United States towards the Government of Chili,

In behalf of the United States it is insisted that such acts constitute a violation of our municipal law, as well as of the law of nations, and subjects such vessels and tackle to forfeiture, and also the cases of arms found on board.

Sixth. It is at least impliedly held by the court below that the statutes of the United States have no application to insurgents or revolutionary forces engaged against a state or power with which the United States is at peace, unless the United States had recognized by some official act the existence of a state of war, and as a

consequence the belligerent rights of both parties to the contest, or as stated by said court—

“A vessel in entering the service of the opposite faction * * * could hardly be said to enter the service of a foreign prince
10 or state, or of a colony, district, or people, unless our Government had recognized * * * faction as at least constituting a belligerent, which it does not appear to have done.” (R., 37.)

On behalf of the United States it is insisted that the fitting out or furnishing of any vessel to aid any number of persons to commit hostilities or armed violence against a nation or people with which the United States is at peace is such a violation of the laws of the United States, as also of the law of nations, as requires the seizure and the condemnation of said vessel.

And that the question whether these insurgents had such a political *status* as to bring them within the neutrality laws or not was not, and is not, a legal question in the first instance, but belongs to the executive branch of the Government, whose decisions the courts follow, and that upon the facts found the insurgents of Chili were at the time named not recognized by the executive department and were consequently without belligerent rights.

Seventh. Inasmuch as the determination of the said cause in the said court is final unless this court shall by proper order direct otherwise, and inasmuch as the issues involved are international in their character and of such dignity and importance that the peace of our people might depend upon the proper construction of the statutes under which these issues arise, it is respectfully submitted that the appeal should be heard in this court in the first instance and a final decision of the force, scope, and effect of said act obtained, as well as of its relations to the law of nations.

It is submitted that such course is more consistent with
11 the policy of our Government from the earliest times, and better calculated to promote harmony between this and other powers, than to leave questions upon which high authorities have heretofore differed to the perhaps varying decisions of the several Circuit Courts of Appeal.

And the United States files herewith and makes a part of the petition herein a full, true, and correct copy of the record as it was made in the district court of the United States for the southern district of California, together with the transcript and all proceedings as the same stands and remains in said United States Circuit Court of Appeals, Ninth Circuit.

Wherefore, petitioner prays that this honorable Court will take cognizance of the matters herein set forth and referred to, and will be pleased to require by writ of certiorari the said cause to be certified to it by the said United States Circuit Court of Appeals for the Ninth Circuit for its review and determination, pursuant to the

provision of the statute, and that this Court will thereupon make such further order or decree as justice may require.

CHARLES H. ALDRICH,
Solicitor-General.

W. H. H. MILLER,
Attorney-General.

NOTE.—At the same time the libel herein referred to was filed and the proceedings had, a similar libel was filed against “2,000 cases of arms,” etc. The court below, in its opinion (Rec., 44) treated these cases as one case, and we assume that they should be so treated here, as the determination of one is necessarily decisive of all the questions involved in the other.

No. 1204. UNITED STATES v. STEAMSHIP ITATA. Petition for a writ of certiorari to the United States Circuit Court of Appeals for Ninth Circuit. October 31, 1892: Petition denied without prejudice. Mr. Attorney General and Mr. Solicitor General for petitioner. No opposition. 149 U. S. p. 789.

1 In the Supreme Court of the United States.

October Term, 1892.

In the Matter of the Application of the United States for a Writ
Certiorari, under the Act of March 3, 1891, in the case of

THE UNITED STATES, Appellants,	}
vs.	
THE STEAMSHIP ITATA, HER TACKLE, apparel, furniture, etc.	

Now pending in the United States Circuit Court of Appeals for the
Ninth Circuit.

BRIEF FOR THE UNITED STATES.

I.

Statement of Facts.

The facts of this case as found by the court below are set out in the opinion made a part of the record filed with the petition (Record, pp. 30-44) and again in the petition herein and it is assumed need not be repeated here.

2 In brief it is shown that the *Itata*, originally an ordinary merchant vessel, had, at the date of the happening of the events complained of, been captured by the Congressional party, a party engaged in an effort to overthrow the then established and recognized Government of Chile, with which Government this nation was at peace. Being thus captured, the vessel was put in command of one of its officers and used as a transport to convey troops, provisions, and munitions of war. Four small cannon were also put upon her decks and she carried a jack and pennant. She was sent to the harbor of San Francisco under the command of an officer of the *Esmeralda*, a so-called war ship belonging to the insurgent forces.

She was not in command of a master, nor did she do any act that would, in the remotest degree, tend to show that she was engaged in any commercial enterprise. It is true that she represented to the customs officers at San Diego that she was an ordinary merchantman and was bound to some port on the northern coast, but inasmuch as this representation is found by the court to have been false, it is a circumstance to be considered against the vessel under well-settled principles of construction amply sustained by authorities, as are likewise the facts found that she hauled down her jack and pennant, stowed away in her hold the cannon theretofore carried on her decks and also the arms of the soldiers on board, removed their uniforms, as also those of the officers, who all

when in our waters, appeared in civilians' dress. She did nothing honestly as a commercial vessel engaged in a lawful mission would have done. Even the coal and stores of provisions
 3 bought of our merchants were marked in the name of the *Esmeralda*, the war ship whose captain was in command, and which had escorted her upon her way.

The effect of these actions, as evidential facts bearing upon the character of the vessel and the intent of those concerned in supplying her with munitions of war, is discussed later.

Prior to her arrival at San Diego, an agent of the insurgent forces had bought in New York 5,000 rifles and 2,000,000 cartridges. The evidence clearly establishes, and it is so found by the court, that the shipment to California and the arrival of the *Itata* off the coast of that State were in accordance with a prearranged plan of the insurgent powers, and consequently all should be considered together in reaching a determination as to the true nature of the transaction.

It is to be noted that these arms were not purchased or put in course of shipment with any purpose of re-sale. They were not destined to any merchant of Chile, and the parties had no intention that they should become a part of the mass of goods subject to sale in the territory occupied by the insurgents. It is admitted that the purchase by Trumbull, in New York, of the arms company, and the delivery to him there, was a commercial transaction, but it is contended that from the time of such delivery it would be a misnomer to speak of these goods as a subject of commerce. The court below seemed to think the armament of this vessel so slight that it could not reasonably be held to a war vessel or capable of cruising or committing hostilities against the Government of
 4 Chile, and also held, in effect, that to carry arms to the insurgent forces on land constituted no offense known to our laws.

We deny both conclusions for reasons given later.

The court also found as matter of fact that the *Itata*, after its seizure, by direction of the Attorney-General, on the 6th day of May, 1891, without obtaining clearance papers, and against the protest of the person left on board and in charge of her by the marshal of the southern district of California, weighed anchor and steamed out of the harbor of San Diego to meet the *Robert and Minnie*, a vessel engaged by the agent of the Congressional party to carry the arms to the *Itata*. "While steaming out of it [the harbor] one or both the *Itata's* cannon were brought on deck and some of the soldiers appeared in uniform." R., 33.

The court also found, R., 45 :

"On September 4, 1891, the Congressional party was recognized by the Government of the United States as the established and only government of Chile. Prior to that time there had been no recognition of that party by this government, other than that, on March

4, the Secretary of the Navy cabled Admiral McCann 'to proceed to Valparaiso, and observe strict neutrality, and take no part in troubles further than to protect American interests.' On March 26 the Secretary of the Navy cabled Admiral Brown, who had superseded Admiral McCann, 'to abstain from proceedings in nature of assistance to either, that is, the Balmaceda or Congressional party; that the ships of the latter were not to be treated as piratical so long as they waged war only against the Balmaceda government.'

5 On April 25 Secretary of State Blaine cabled the American minister: 'You can act as a mediator with Brazilian minister and French chargé d'affaires.' On May 5 Minister Egan cabled this Government: 'Government of Chile and revolutionists have accepted mediation of the United States, Brazil, and France most cordially; those of England and Germany declined.' On May 7 Acting Secretary of State Wharton acknowledged the dispatch of Minister Egan, and 'expressed hope that through combined efforts of the governments in question the strife which has been going on in Chile may be speedily and happily terminated.' On May 14 Acting Secretary of State Wharton cabled Minister Egan that 'French minister reports threats to shoot the insurgent envoys by Balmaceda,' and directed that they should have ordinary treatment under flag of truce."

The record shows that the *Itata* escaped, forcibly putting ashore the custodian placed in charge upon her seizure. She was surrendered at Valparaiso to a war ship of the United States, and was by the *Charleston*, a public armed vessel of the United States, brought back to a port of the United States. Bond was given, evidence taken, a trial had, and the libel was dismissed, from which decree the United States appealed to the United States Circuit Court of Appeals for the Ninth Circuit, where the cause is now pending and undetermined, and from which court the Government, with the concurrence of the opposing counsel, seeks by writ of certiorari to remove the record of this Court.

II.

The Real Character of the Itata.

6 It is contended on behalf of the United States that the vessel was piratical, and as such had no right in our waters, except in a case of distress involving such overwhelming necessity that the dictates of humanity would overcome the law of nations and our own municipal law. No such case is under consideration. There had been no recognition of these revolutionists. It may be said that the several dispatches by the Secretaries of the War and Navy Departments involve the recognition of a state of war and of belligerent rights. We think not, because they were evidently intended simply to regulate the action of our representatives in foreign ports, and have no reference to this vessel. They are not in any

way public notice of the attitude of the Executive Department of our Government. It would be more reasonable to construe the action of the Attorney-General, directing the seizure of the vessel, as evidence of a refusal to accord belligerent rights, as this was a positive act against the alleged belligerents, while the other dispatches were mere instructions to the agents of the Government to refrain from action.

The question whether these people were pirates and robbers in the eye of the law, or possessed of belligerent rights, is dependent upon the fact of recognition by the political department, or the absence of it. The question is not for the courts, and is discussed more at length under another head.

It is also discussed with so much learning in the case of *The Ambrose Light* (25 F. R., 408, 428-447), that we refer to that case and the full citation of authorities there found.

7 That they were considered piratical by the court below is shown by the following quotation from the opinion of the learned judge (Record, p. 35).

"It is contended on behalf of the defendants that section 5283 has no application to this case for the reason that the people designated in the indictment as the Congressional party do not constitute a 'people' within the meaning of that section. It is beyond question that the *status* of the people composing the Congressional party at the time of the commission of the alleged offence is to be regarded by the court as it was then regarded by the political or executive department of the United States. This doctrine is firmly established. *Gelston vs. Hoyt*, 3 Wheat. 246-324; *U. S. vs. Palmer*, 2 Id. 610-635; *Kennett vs. Chambers*, 14 How. 38; *Wharton's Int. Digest*, pages 551-2, and cases there cited.

"If the dispatches from the Secretary of the Navy, the Secretary of State and Acting Secretary of State, already referred to, are to be considered as indicating the light in which the people composing the Congressional party of Chili were regarded by the Executive Department of this Government prior to their recognition on the 4th of September, the position of the United States towards them seems to have been similar to that taken by the United States towards the insurgents in Hayti in 1869. That position was thus stated by Mr. Fish, then Secretary of State, in a letter dated September 14, 1869:

"1. That we do not dispute the right of the Government of Hayti to treat the officers and crew of the *Quaker City* and *Florida* (vessels in the service of the insurgents against Hayti) as pirates for all intents and purposes. How they are to be regarded by their own legitimate government is a question of municipal law into which we have no occasion, if we had the right, to enter.

8 "2. That this Government is not aware of any reason which would require or justify it in looking upon the vessel named in a

different light from any other vessel employed in the service of the insurgents.

“‘3. That regarding them simply as armed cruisers of the insurgents not yet acknowledged by this Government to have attained belligerent rights it is competent to the United States to deny and resist the exercise by those vessels or any other agents of the rebellion of the privileges which attend maritime war in respect to our citizens or their property entitled to their protection. We may or we may not at our option, as justice or policy may require, treat them as pirates in the absolute and unqualified sense, or we may, as the circumstances of any actual case shall suggest, waive the extreme right and recognize, where facts warrant it, an actual intent on the part of the individual offenders not to depredate in a criminal sense and for private gain, but to capture and destroy *jure belli*. It is sufficient for the present purpose that the United States will not admit any commission or authority proceeding from rebels as a justification or excuse for injury to persons or property entitled to the protection of this Government. They will not tolerate the search or stopping by cruisers in the rebel service of vessels of the United States, nor any other act which is only privileged by recognized belligerency.

“‘4. While asserting the right to capture and destroy the vessels in question, and others of similar character, if any aggression upon persons or property entitled to the protection of this Government shall recommend such action, we cannot admit the existence of any obligation to do so in the interest of Hayti or of the general security of commerce.’ Whart., Int. L. Dig., Vol. 3, p. 465-6.”

The court continues:

“Does section 5283 of the Revised Statutes apply to any people whom it is optional with the United States to treat as pirates? That section is found in the chapter headed ‘Neutrality,’ and it was carried into the Revised Statutes and was originally enacted in furtherance of the obligations of the nation as a neutral. The very idea of neutrality imports that the neutral will treat each contending party alike; that it will accord no right or privilege to one that it withholds from the other, and will withhold none from one that it accords to the other.

“In the case of the *United States vs. Quincy*, 6 Peters, 443, the Supreme Court of the United States said that the word ‘people,’ in the third section of the act of April 20, 1818 (and from that carried into the Revised Statutes as section 5283), ‘is one of the denominations applied by the act of Congress to a foreign *power*.’ This can hardly mean an association of people in no way recognized by the United States or by the government against which they are rebelling, whose rebellion has not attained the dignity of war, and who may, at the option of the United States, be treated by them as

pirates. Prior to the passage of the act of April 20, 1818, the Supreme Court of the United States, in the case of *Gelston vs. Hoyt*, 3 Wheat. 245, speaking through Mr. Justice Story, held that section 3 of the act of 1794, prohibiting the fitting out any ship, etc., for the service of any foreign prince or state, to cruise against the subjects, etc., of any foreign prince or state with which the United States were at peace, did not apply to any new government, unless it had been recognized by the United States, or by the government of the country to which such new country belonged. And that a plea which set up a forfeiture under that act, in fitting out a ship to cruise against such new state, must aver such recognition, or it is bad.

"Congress in passing the subsequent act of April 20, 1818, by which the provision referred to of the act of 1794 was, in substance, re-enacted, must be presumed to have known the construction that had been theretofore put by the Supreme Court upon the words 'prince or state' in the act of 1774, and with that knowledge, in passing the act of 1818, inserted in the same clause the words 'colony, district, or people.' This was done, according to Dana's *Wheaton*, sec. 439, note 215, and Wharton's *Int. Dig.*, p. 561, upon the suggestion of the Spanish minister that the South American provinces then in revolt, and not recognized as *independent*, might not be included in the word 'state.' But in every one of those instances the United States had acknowledged the existence of a state of war and, as a consequence, the belligerent rights of the provinces. The *Ambrose Light*, 25 Fed. Rep. 414, and references there made.

"It will be observed that the Supreme Court in the case of *Gelston vs. Hoyt* did not say that the *independence* of the new government must have been recognized by the United States to make the statute of which it was speaking applicable. There are different kinds or degrees of recognition, but can it be properly said that in passing an act in furtherance of the obligations of the nation as a neutral, Congress was legislating with reference to a people not in any way recognized by the Government of the United States, and whom it might, at its option, treat as pirates?"

11 This view of the *status* of the vessel is illustrated by the following quotations from the case of *The Ambrose Light*, 25 F. R. 408, 418, 420:

"The recognition by foreign states of a state of war in civil strife, or, what is the same thing, a recognition of the belligerent rights of the insurgents, authorizes courts of law to treat the insurgents as lawful combatants. In the language of Burke, 'It is an intermediate treaty that puts rebels in possession of the law of nations.' It gives them temporarily, and for war purposes, the *status* of an established nation, and all the rights of public war. On the one hand it is a concession to rebels in the interest of humanity and expediency. On the other hand, since recognition of belligerency is not usually accorded till rebellion rises to the dignity of real

war, and in its general aspects is fairly entitled to belligerent rights, notwithstanding the burdens it inflicts on other nations, it may be viewed as an adjustment by foreign nations of their own relations, so as to accord with the just requirements of the actual facts. If recognition be granted, it relieves the parent state from all responsibility for damages for any irregularities or violence committed by the other belligerent.

“Until some recognition by the political department, express, implied, or tacit, of new conditions in foreign states, there is no ‘open war,’ no ‘belligerent;’ there are no ‘enemies’ that the court can recognize, but only insurgents. Under such circumstances no legal validity can be allowed in courts of law to the commissions given by such insurgents. In the case of *United States vs. Klintock*, 5

12 Wheat. 144, on an indictment for piracy committed in 1818, it appeared that the privateer sailed under a *commission* from one Aury. Chief Justice Marshall said (p. 149):

“‘So far as this court can take any cognizance of that fact, Aury can have no power, either as a brigadier of the Mexican Republic—a *republic of whose existence we know nothing*—or as generalissimo of the Floridas—a province in the possession of Spain—to issue commissions to authorize private or public vessels to make captures at sea.’”

Upon the facts found, and in view of the executive action directing the seizure of the *Itata*, her escape and practical recapture by an armed vessel of the United States and returned to our ports, it is presumed by executive order, it is confidently urged that she cannot be considered as belonging to any belligerent power.

III.

The duty of the United States.

a. As a question of international law.

b. As a question of municipal law.

(a) It is found as a fact by the court below that—

“No evidence was introduced tending to show that the Congressional party ever received any recognition of any character from the Government of the United States until September 4, when it was recognized as the established and only government of Chile.”

13 This quotation is found in the Record, page 33, and is a part of the decision *In re Trumbull*. The cases were heard together, and upon the same evidence, and are properly, as we submit, to be considered as a part of the *Itata* case, although no appeal can be prosecuted so far as the acquittal of Mr. Trumbull is concerned.

The duty of neutrality is now a recognized principle of international law. It does not consist merely of a non-intervention. Intervention is a positive act, unequivocal in its character. If attempted

in aid of Chile, but without the request of that Government, it would have been officious and perhaps unwelcome. If in aid of the insurgent or rebel forces, it would have been an espousal of their cause and an act of war against the Balmaceda Government. As was said by the counsel for the United States in the Alabama case—

“But, if a nation abstains from intervention in the conflict between a sovereign nation and its rebels, it is inaccurate to treat this *abstinence* as *neutrality*. It is simply an unbroken maintenance of the international relations which subsisted between the two powers before the domestic peace of one of them suffered disturbance. It would shock the moral sense of civilization to speak of the United States as standing *neutral* between Great Britain and the Sepoy rebellion in India, or of Great Britain as standing *neutral* between the commune of Paris and the Government of France.

“But when the actual hostilities in which a government is engaged, in the suppression of a rebellion, encroach upon the established relations between it and friendly powers, the latter have presented to them the question whether they will, each for itself, acquiesce in the exercise of belligerent powers, as sought to be made
14 effective against the rebels, at the cost of interference with the peaceful rights of commerce and intercourse which subsisted before the nation was brought into this stress by its domestic rebellion.

“But this question, under the rules governing the subject in the modern law of nations, can have but one answer. The nation which has superadded belligerent rights to those of sovereignty is entitled so to do, and resistance by other nations to the fair consequences of such rights upon their interests is a violation of the law of nations, and an unjust intervention in the domestic conflict.

“In regard to the hostilities prosecuted against the sovereign by the rebel, if they should pass beyond the bounds of intestine war and obtrude themselves upon the notice of other sovereign powers, the actual occurrences which raise the question of their treatment by such powers may be trusted also to solve it. If the rebels should exhibit their strength by a blockade of any of the ports of the nation, or should keep the seas with cruisers, and assert the right of search, of capture, and of prize condemnation against the ships or cargoes of another nation, the power thus affected will determine for itself how it will treat this new disturber of its peaceful rights and interests. It has no *antecedent* obligations of friendship, of treaty, or of recognition even, which compel it to acquiesce, under the law of nations, in the legitimacy of this violence. It may pierce by force the rebel blockade which impedes its commerce, resist and resent the search and capture which threaten its maritime property, and reject the asserted prize jurisdiction as working no change of title. And it may do all this without, in the least, taking part in the hostilities of the government against the rebels or espousing its

cause, but simply in maintenance of its own rights and interests."

15 "Undoubtedly, it is competent for other nations upon whose notice the hostilities of rebellion, revolution, or revolt may obtrude themselves, to yield such assent and submission to their exercise, to the disturbance of their own rights and to the disparagement of their own interests, as, under sentiments of justice, fair play, or humanity, they may find an adequate motive for.

"This course tends to, and naturally results in, a tacit toleration of this violence as in the nature of belligerent power, because it is practiced in that sense and under that justification by those who exert it. Placed, then, between the contending parties in the attitude of obligatory submission to the belligerent right of the sovereign, and of voluntary tolerance of the belligerent practices of the rebels, other nations fall gradually into an equality and impartiality in dealing with the rightful belligerent power and the *de facto* belligerent force, which assimilates itself to the *status* which, between two rightful belligerent powers, is called, in the law of nations, *neutrality*. 3 Geneva Arbitration, pp. 8, 9."

It is to be remembered that at this time the United States had done no act tending to accredit the rebellion in Chile, without which the persons engaged therein had no belligerent rights as to this Government; until such rights were accorded them, all warfare conducted by that people upon the ocean bore the legal character of piracy, and upon land that of robbery. As pirates they were without the pale of the law, and in theory the power of every nation was to be exerted against them. At this time, therefore, it was not the duty of the United States, under the rules and principles of international law, to accord to these people in rebellion the same

16 privileges as to the recognized Government of Chile; with one, there could, at this time, be no legitimate trade or commerce as such; with the other, the right so to trade was unlimited, so far as international rules and principles are concerned.

Perhaps this is more clearly expressed in this way: The executive branch of this government not having yet recognized the existence of the *de facto* belligerent force, the merchants of the country were at liberty to trade with any persons residing in any part of the Government of Chile; and therefore the sale of merchandise for shipment to Chile, to there become a part of the merchandise of that country, was a lawful transaction, as would have been the sale of merchandise to the Government of Chile. If, by proclamation or other action of the executive branch of the Government, the party known as the Congressional party had received the recognition of belligerents, then perhaps a sale to that *de facto* organization would have been proper under the principles of international law as construed in the interest of commercial freedom, and even if the sale consisted of articles of war.

We say *perhaps*, though it is submitted that the tendency of modern times is to condemn trade in such articles by neutrals as between belligerent forces, a tendency more in accord with the enlightened spirit of the age in which we live. We do not feel that it is necessary for us to admit the proposition or that its discussion is pertinent to the issues involved in this case, for we have here to deal with a sale not to a recognized power or to a people with which our country was at peace, but to a rebel people without rights of belligerency, mere pirates or robbers, who were about to take munitions of war in a boat owned by them from our waters to engage in a warfare upon a friendly power.

The question is, was it the duty of this Government to allow such an expedition to leave its waters.

There is therefore no question of neutrality, as that term is known in international law, which only exists between belligerents—a *status* composed of a rightful belligerent power or a *de facto* belligerent force made so by recognition.

In so far as the Executive of the United States had acted it had been to the effect of denying the existence of this *de facto* power. This record discloses the fact that the Attorney General directed that steps be taken to prevent the contemplated assault on the commerce and land forces of a friendly power by the seizure of the vessel.

This was executive action, and must be imputed to the President and his official advisers as a body. With that action as a refusal to then recognize the existence of a *de facto* belligerent force, it is submitted the judicial power has nothing to do; in the wise adjustment and distribution made by the founders of our system of government there is no one fact more clear than that the judiciary has no power to direct executive action in reference to our foreign relations. The courts can, in some instances, as in this case, determine whether the facts warranted the executive action. This right of course exists only as applied to the investigation of property rights, and has no bearing upon questions of judgment and discretion.

In the case at bar the court will hardly feel called upon to hold that the Congressional force as it is now known had then the rights of belligerents; a conclusion which must, we respectfully submit, be first reached before it can be held that it was the duty of this Government to allow the *Itata* to proceed on its course with its load of munitions of war.

The distinction has been sometimes overlooked, but rests upon the plainest dictates of expediency and justice. Until recognition is accorded the rebels by other nations, they are not waging war or engaged in a contest for maritime supremacy, but are merely robbers and pirates, having no belligerent rights. If the peace of the world is to be preserved, attacks by a people of this character must not be supported, aided, or assisted, by other nations. To do so is *casus belli*. When, however, the rebellion has grown to such proportions,

and by the exercise of its force it has assumed such dignity, that the executive and legislative branches of the Government choose to recognize the condition as that of war, the dictates of humanity and the interests of trade lead to the recognition of belligerent rights.

By this course the horrors of war are greatly lessened, and the right to trade with the entire people is admitted, subject only to capture by the belligerent force as contraband of war. Until such recognition the insurgent force is one which cannot be dealt with as an entity without violating moral, political, and legal duties.

It follows, logically, we submit from the principles we have asserted, that at this time the same rights could not be accorded the *Itata* as a vessel belonging to an unrecognized political
19 force as could rightly be extended to a vessel belonging to the friendly Chilean Government. The distinction has no reference to mercantile vessels belonging to private parties.

It remains to determine what are the rights of vessels owned by a recognized government. The most important of these privileges is the concession of continual territoriality of the state to which the vessels belong—

“And a consequent exemption from the *jurisdiction of the courts and process* of the nation whose ports or waters they visit. But the same reason which gives support to this immunity throws them under the immediate political treatment of the hospitable state, as represented by its executive head, in the conduct of this international, if subordinate, relation. How, under the circumstances of each case calling for executive action, the vessels are to be dealt with is determined, in the first instance, by the government having the occasion to exhibit the treatment. For its decision, and the execution of it, it is responsible, politically and internationally, and not otherwise, to the sovereign whose public ships have been so dealt with. That, ordinarily, the offense calling for remonstrance or intervention would not be made the subject of immediate and forcible correction, applied to the vessel itself, but would be brought to the attention of its sovereign for correction or punishment and apology, or other amends, may be assumed. But all this is at the discretion of the power having occasion to exert, control, seek redress, or exhibit resentment. The flagrancy or urgency of the case may dictate another course, to be justified to the sovereign affected upon such considerations.

“When, however, the anomalous vessels of a belligerent, *not*
20 *recognized as a nation or as a sovereign*, claim a public character in the port of hospitality, the only possible concession of such character must, in subtracting them from judicial control, subject them to immediate political regulation *applied to the vessels themselves*. There is behind them no sovereign to be dealt with, diplomatically or by force. *The vessels themselves* present and represent at once whatever theoretical public relation exists or has been accepted. To hold otherwise would make the vessel wholly

lawless and predominant over the complaisant sovereign, helplessly submissive to the manifold *irresponsibilities* the quasi-public vessels assume to themselves.

"The necessary consequence is that when the offending vessels of the non-sovereign belligerent have taken the seas only by defrauding or forcing the neutrality of the nation whose hospitality they now seek, such nation has the right, and, as *toward the injured nation demanding its action upon the offending vessels, is under the obligation to execute its coercive, its repressive, its punitive control over the vessels themselves.* It cannot excuse itself to the injured nation for omission or neglect so to do by exhibiting its resentment against, or extorting redress from, any responsible sovereign behind the vessels, nor can it resort to such sovereign for indemnity against its own exposure to reprisals or hostilities, by the injured nation, or for the cost of averting them. 3 Geneva Arbitration, 153."

The conclusions follows, upon the plainest principles of international law, as well as of sound reason and policy, that it was the duty of the United States to seize and condemn this vessel and cargo. To allow her to leave our wa-

21 ters with a cargo of muskets and cartridges, whether for use on the sea in maritime warfare, or for the purpose of conveying them to insurgent associates in arms on land, would have made this Government liable in damages to the recognized Government of Chile. The principles asserted by the United States in the Alabama case, and sustained by the arbitrators, would make this the duty of a neutral between belligerent forces. This decision was only declaratory of the law of nations as it then existed, and in no sense a change or addition thereto. It is common knowledge, and needs no exemplification in this court, that the state of neutrality between belligerents confers a wider latitude of commerce than is accorded to pirates, against whom all nations and all men are supposed to be arrayed.

Again, this duty of the United States to seize and condemn as prize is sustained by precedent and by the leading writers on international law.

These principles are so clearly stated and the authorities so carefully collated, in the opinion of Judge Brown, of the District Court for the Southern District of New York, that we have attached liberal extracts therefrom as an appendix to this brief, and respectfully request that it may be considered as a part of our argument.

Assuming the vessel to be an armed vessel, it was subject to condemnation as prize under the law of nations; assuming that she was engaged in transporting the arms to the insurgent force in Chile, a like duty rested upon the United States, with like powers of enforcement under the laws of nations.

22 b. As a question of municipal law.

The duty of the United States under the law of nations being established, it remains to consider the question as one of

municipal law. A condemnation as prize might have been had under the law of nations. This course was not adopted, and the proceedings were instituted under the municipal law for forfeiture.

It is submitted that such law is but declaratory of the law of nations, and is in all respects as comprehensive in its terms and objects as applied to the question at issue.

Sir Robert Phillimore thus states the duty of a nation standing neutral:

"It is a maxim of general law that, so far as foreign states are concerned, the will of the subject must be considered as bound up in that of his sovereign.

"It is also a maxim that each state has a right to expect from another the observance of international obligations, without regard to what may be the municipal means which it possesses for enforcing this observance.

"The act of an individual citizen, or of a small number of citizens, is not to be imputed without clear proof to the government of which they are subjects.

"A government may by *knowledge* and *sufferance*, as well as by direct *permission*, become responsible for the acts of subjects whom it does not prevent from the commission of an injury to a foreign state.

"A government is presumed to be able to restrain the subject within its territory from contravening the obligations of neutrality to which the state is bound.

"The government of the owner of the captured property may, indeed, call the neutral to account for permitting a fraudulent, unworthy, or unnecessary violation of its jurisdiction, and such permission may, according to the circumstances, convert the neutral into a belligerent.

"In fact, the maxim adverted to in a former volume of this work is sound, viz., that a State is, *prima facie*, responsible for whatever is done within its jurisdiction; for it must be *presumed* to be capable of preventing or punishing offenses committed within its boundaries. A body politic is, therefore, responsible for the acts of individuals which are acts of actual or meditated hostility toward a nation with which the government of these subjects professes to maintain relations of friendship or neutrality. 3 Geneva Arbitration, pp. 20, 21."

Quoting this, the eminent counsel of the United States in the Alabama Case contended:

"Sir Robert Phillimore at a blow strikes to the earth the whole fabric of the British case and countercase in declaring that no government has a right to set up the deficiency of its own municipal law as excuse for the non-performance of international obligations toward a foreign state.

"He lays down the rule that a government may by *knowledge* and *sufferance*, as well as by direct *permission*, become responsible for the acts of subjects (including commorant or transient aliens) whom it

does not prevent from committing injury to a foreign state. This proposition is not presented by Sir Robert Phillimore as based on any express treaty stipulation, but as being the doctrine of the law of nations. As such it serves to construe the "due diligence" of the treaty of Washington.

"In expounding the proposition of the impartiality requisite in the character of a bona fide neutral, he declares that such neutrality is violated by any act which *better*s or *strengthens* one of the
24 belligerents, or by any act which *gratifies* one of the belligerents." 3 Geneva Arbitration, pp. 21, 22, 23."

This court has adopted the same high views, holding that the laws of "the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations, or the general doctrines of national law." *The Amelia*, 1 Cranch, 1, 43.

It will be remembered that in the case of the Alabama claims it was contended by the British Government that its liability was measured by its own municipal law, and if it had done all that was required by such law it had used due diligence and could not be held responsible for the depredations of the rebel cruisers fitted out from its ports. On the part of the United States it was contended that the test must be found in the law of nations; to hold otherwise would be equivalent to holding that if a nation had no municipal law upon the subject it would owe no duty to other nations. The arbitrators held with the American counsel.

It therefore becomes important to determine if the contention of the executive department of the Government in one of the greatest diplomatic and legal contests in which it has ever been engaged, fortified by the decision of the arbitrators at Geneva, was wrong; or at least, to determine if the municipal law of the United States is inadequate to the discharge of its duty as a nation in the family of nations, contrary to the contention of the eminent counsel who there represented the Government. As we have seen, such conflict or inadequacy is not to be presumed. If, however, it exists, it should be known, that Congress may supply the defects.

25 Sections 5283, 5285, and 4294, Revised Statutes, are printed in the appendix to this brief. The first prescribes penalties against any person who fits out and arms, attempts to * * * , procures to be * * * , or is concerned in furnishing, fitting out, or arming of any vessel, with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people to cruise or commit hostilities against the subjects * * * , are guilty of a high misdemeanor. The vessel, * * * munitions of war, etc., are forfeited.

We submit that furnishing, fitting out, and arming are not one and the same thing. Such tautological use of language is not to be imputed to the lawmakers. Within this language there is embraced, as we think, any act by which the ship is better qualified to render

assistance to the people in whose service it is engaged. The language is general and comprehensive, connected by the disjunctive "or," and should be held to embrace not only arms, but every assistance to the purpose of the unfriendly ship, which is as much engaged in unlawful acts in making use of our ports to procure financial or military aid to the insurgent forces as in making war by sea on the commerce of the state with which the United States are at peace. Such acts are as well calculated to interrupt these friendly relations, which it is the purpose of these laws to maintain.

This construction is favored by the term to "*cruise or commit hostilities.*" What is meant by the words "or commit hostilities?" To confine it to attacks by the vessels so furnished or
26 fitted upon other vessels is to emasculate the law and do violence to the language used. It should be held to embrace any act calculated to sustain or strengthen the rebel forces, or aid the attempt to overthrow the established government. To carry food, arms, men to such a power is to "commit hostilities" against the established government, where, as in this case, there are no belligerent rights and no pretenses of commerce, the vessels and arms being owned by the insurgent people.

This view is sustained by the case of *The City of Mexico* (28 F. R., 148) and the cases there cited.

The right of blockade as asserted in *The Prize Cases* (2 Black, 635), and to treat all property in the enemy's country, or destined to enemy's ports, as enemy's property, proceeds upon this theory, and obtains, as there asserted, irrespective of the actual loyalty or disloyalty of the owner. Nations admit this right of capture even of neutral vessels engaged in such trade, on the ground that such property affords aid to the enemy and prolongs the contest. If this is true as applied to a neutral ship, certainly a vessel owned, officered, and manned by rebel forces engaged in carrying arms, let us admit for the sake of the argument, as found by the court, to the rebel land forces, was furnished to commit hostilities upon the Government of Chili.

This leaves only the question of intent. If correct in our definition of the meaning of the words "commit hostilities," any discussion of the question is unnecessary, as the fact is found by the court. Without dwelling upon this branch of the discussion,

27 we submit that the ownership of the vessel, the arms, the prearrangement by which the agent of the insurgents appeared in this country and made the purchase, the sending of the *Itata* with an armed convoy for a part of the way and under command of an officer of a war ship, with soldiers and cannon aboard, the flag, the subsequent concealment of arms, the change of dress, the false statements to the customs officer, the failure to give bond as required by law, the secret and circuitous methods adopted to take the cargo of arms, all show an unlawful intent too plain to

admit of argument. Upon well-settled principles these circumstances weigh against the vessel, and are determinative of her character and purpose.

The question of intent is to be deduced from the acts of the vessel and those concerned in her fitting out. It is never necessary to show that the accused knew or thought that what he was doing was a crime. The law never admits the ultimate object or motive to be a justification where the means are unlawful. *The Ambrose Light*, 25 F. R. 408, 426, 427.

The character of the act and the motive inducing it are to be inferred from acts of deception and falsehood accompanying it rather than the testimony of the accused after detection and seizure. *The Slavers*, 2 Wall. 350, 366, 375, 383; *The Luminary*, 8 Wheat. 407; *Clifton vs. United States*, 4 How. 242; *The Cornelius*, 3 Wall. 214.

We have so far discussed this question as if the purpose of the *Itata* was to convey these arms and troops to the insurgent forces in Chile, as assumed by the court below. This is not conceded. The

28 court seemed to suppose that the question was to be determined by a consideration of the extent of the armament, and because he did not find a large force of men and cannon on board, and that the vessel was a formidable instrument for the destruction of commerce, therefore it was not an arming, etc. It is submitted that this is not the test. It is so expressly decided in *United States vs. Gooding*, 12 Wheat. 460, 472. The court cannot say that this vessel could not have captured or destroyed the merchant vessels of Chile. It cannot, it is submitted, assume that these cartridges and muskets, nor any part of them, were not designed for use aboard ship. If that were a material point, and the most narrow construction of the statutes were to be adopted, enough facts had been shown to put upon the vessel the duty of clear proof upon this subject; as held in the case of the *Estrella*, 4 Wheat. 208, 307.

"On the libellant, in the first instance, lay the *onus* of showing that the crew of the *Constitution* had been increased within the United States; having done this, it became incumbent on the captors, if they wanted to establish their innocence, to show, as was in their power if the fact was so, that they had done nothing contrary to law, by bringing their case within the proviso that has been mentioned."

It has been held that it is not necessary, under this act, that the vessel should have been armed, etc., while in the waters of the United States if the person initiating the attempt, or concerned in such arming or furnishing was within the limits of the United States, as *Trumbull* was. *United States vs. Quincy*, 6 Pet. 445; *United States vs. Hogan*, 18 F. R. 529; *The Meteor*, 1 Am. Law Rev. 401, 404.

29 We only mention this general ruling to show the spirit in which the court has sought to make the law coextensive with the law of nations upon the subject. In this case, the arms were actually transferred to the *Itata* within the limits of the United States.

It is, however, insisted that the recognized insurgents did not constitute a "people" within the meaning of the act. The history of the act is against such construction. As originally passed, it embraced only foreign princes or states. It was held that these words implied sovereignty, the supreme power of a state which could not be predicated of a people conducting hostilities with the hope of securing independence, but as yet unrecognized as a political power.

The view of the court below entirely ignores the history of the act and seems to need no refutation. It is admitted by us that the word is sometimes used in the sense of "nation," but its history and context in this act give it the general meaning authorized by the lexicographers.

The early law of 1794, the change in the present act by the addition of the words "colony, district or people," and that the above is the proper interpretation are shown by reference to the following authorities: *Gelston vs. Hoyt*, 3 Wheat. 246, 323, 324; 13 Op. Atty. Genl. 177, 179; 3 Wharton International Law Dig., Section 396.

We conclude that the municipal law of the United States is as broad as the law of nations upon the subject of neutrality and aid to people in rebellion against a power with which this

30 Government is at peace; that there is no need of additional legislation to enable this Government to protect itself against violations of its duty under the law of nations, and consequent indemnity if violations occur along our coast; and that the facts of the case as found required that the libel should be sustained, and the vessel, her tackle, apparel and furniture, together with the arms and ammunition on board, be condemned.

In fact, the greatest danger of our becoming involved in international difficulties or subject to damages arises from just such a condition of affairs as here existed. A power recognized among nations can be dealt with as such, and in the early stages of its existence will take care not to involve itself in controversies with established governments by infractions of the law of nations or of the municipal law, while an irresponsible, unrecognized power, unrestrained by any considerations of accountability, will, as in this case, resort to deception and force to accomplish its unlawful purpose. It is earnestly insisted that every consideration of public policy favors that meaning of the word "people," evidently intended by the legislative power when it was added to the act.

IV.

The Subsequent Recognition of the Insurgent Force by the United States.

It is insisted that the subsequent success of the insurgent forces and recognition by the United States should be considered
 31 by the court as validating the act of the *Itata* and those concerned in her fitting out, or at least should prevent a decree reversing the action of the lower court.

It is respectfully submitted that with that question this court has and can have nothing to do.

The right to condemn the *Itata* must be determined by the facts as they then existed. She was then either guilty or not guilty. The court can institute no inquiries into the *status* of insurgents; it must follow the political department of the Government. This is illustrated in numerous decisions. Thus Judge Nelson, in his charge to the jury in the case of *United States v. Baker*, 5 Blatchf. 6, 14, said, speaking of the recognition of belligerency :

"It involves the determination of great public and political questions, which belong to the departments of our Government that have charge of our foreign relations, the legislative and the executive departments. When those questions are decided by those departments, the courts follow the decision, *and until those departments have recognized the existence of the new government the courts of the nation can not*; * * * the courts are obliged to regard the ancient state of things as remaining unchanged."

He then refers to our acknowledgment of the independence of the South American Republics and adds :

"Prior to this recognition and during the existence of the civil war between Spain and her colonies, it was the declared policy of our Government to treat both parties as belligerents, entitled equally to the rights of asylums and hospitality, and to consider them,
 32 in respect to the neutral relations and duties of our Government, as equally entitled to the sovereign rights of war as against each other. This was also the doctrine of the courts which they derived *from the policy of the Government*, following the political department of the Government as it respects our relations with new governments erected on the overthrow of old one."

In *United States v. Greathouse*, 2 Abb. U.S. 364-380, Mr. Justice Field said :

"The courts * * * cannot treat any new government as having authority to issue commissions or letters of marque, which will afford protection to its citizens, until the legislative and executive departments have recognized its existence. The judiciary follows the political department of the Government in these particulars."

To exempt the *Itata* from forfeiture is not to follow, but to lead the political department. The latter acted in September, 1891; the court is asked to act from May, 1891.

The only safe and consistent rule, it is submitted, is to decide each case upon the facts existing at the time the act is done and leave to the other co-ordinate branches of the Government the settlement of all questions which subsequent events may give rise to. It may be safely assumed that, as in the *Wheeling Bridge Cases*, 13 How. 518; 18 How. 421, if these events make it important or desirable to avoid the court's decision upon the law, the Legislative and Executive Departments will find a way of satisfying the decree.

33 The importance of a construction by this court of the laws applicable in such case far outweighs the mere forfeiture of the vessel and is our excuse, if any is needed for this lengthy presentation of our views.

W. H. H. MILLER,
Attorney-General.
CHARLES H. ALDRICH,
Solicitor-General.

(From the Ambrose Light, 25 F. R., 408, 412.)

* * * The consideration that I been have able to give to the subject leads me to the conclusion that the liability of the vessel to seizure, as piratical, turns wholly upon the question whether the insurgents had or had not obtained any previous recognition of belligerent rights, either from their own government or from the political or executive department of any other nation ; and that, in the absence of recognition by any government whatever, the tribunals of other nations must hold such expeditions as this to be technically piratical. This result follows logically and necessarily, both from the definition of piracy in the view of international law and from a few well-settled principles. Wheaton defines piracy as "the offense of depredating on the high seas without being authorized by any sovereign state or with commissions from different sovereigns at war with each other." (Dana's Wheat. Int. Law, § 122.) Rebels who have never obtained recognition from any other power are clearly not a sovereign state in the eye of international law, and their vessels sent out to commit violence on the high seas are therefore piratical within this definition.

The general principles of international right and of self-protection lead to the same conclusion. (1) All nations are entitled to the peaceful pursuit of commerce through the ports of all other civilized nations unobstructed save by the incidents of lawful war or by the just restrictions of the sovereign. (2) Maritime warfare, with its burdens and inconveniences to nations not engaged in it, is the lawful prerogative of sovereigns only. Private warfare is unlawful. International law has no place for rebellion ; and insurgents have strictly no legal rights, as against other nations, until recognition of belligerent rights is accorded them. (3) Recognition of belligerency or the accordance of belligerent rights to communities in revolt belongs solely to the political and executive departments of each government. (4) Courts cannot inquire into the internal condition of foreign communities in order to determine whether a state of civil war, as distinguished from sedition or armed revolt, exists there or not. They must follow the political and executive departments and recognize only what those departments recognize, and, in the absence of any recognition by them, must regard the former legal conditions as unchanged.

From these principles it necessarily follows that in the absence of recognition by any Government of their belligerent rights, insurgents that send out vessels of war are, in legal contemplation merely combinations of private persons engaged in unlawful depredations on the high seas ; that they are civilly and criminally responsible in the tribunals for all their acts of violence ; that, in blockading ports which all nations are entitled to enter, they attack the rights of all

mankind and menace with destruction the lives and property of all who resist their unlawful acts ; that such acts are therefore piratical and entitle the ships and tribunals of every nation whose interests are attacked or menaced to suppress, at their discretion, such unauthorized warfare by the seizure and confiscation of the vessels engaged in it.

The right of seizure by other nations arises in such cases *ex necessitate*, from the very nature of the case. There is no other remedy except open war, and nations are not required to declare *war* against individual rebels whom they are unwilling and not required to recognize as a belligerent power. Nor are other nations required, 37 for their own security, in such a case to make any alliance with the parent state. By the right of self-defense they may simply seize such lawbreakers as come in their way and menace them with injury. Without this right insurgents, though recognition were rightly refused them and however insignificant their cause or unworthy their conduct, might violate the rights of all other nations, harass their commerce, and capture or sink their ships with impunity.

The whole significance and importance of the doctrine of recognition of belligerency would be gone, since the absence of recognition could be safely disregarded ; the distinction between lawful and unlawful war would be practically abolished ; and the most unworthy revolt would have the same immunities for acts of violence on the high seas, without any recognition of belligerent rights, as the most justifiable revolt would have with it. The right to treat unlawful and unauthorized warfare as piratical seems to me, therefore, clearly imbedded in the very roots of international law.

These considerations seem to me sufficient for the determination of this branch of the case. But, as the *right* of the Government to treat such acts as piratical is vehemently challenged, and as doubt on this point has been expressed by some recent authors, I proceed to consider the subject more in detail.

It should be first observed that the case is not one where recognition of belligerency has been accorded by the parent government or by any other nation. The question here arises upon the entire absence of recognition anywhere. In this respect the case is unique in modern times. No rebels, so far as I am aware, have ever attempted to blockade ports and make an attack on the commerce of other nations without any previous recognition of their belligerent rights. In the case of the late Confederate rebellion President Lincoln, it will be remembered, treated the revolt almost from

38 the beginning as a war waged against the Government, and proclaimed a blockade of the southern ports ; a measure purely belligerent and which the Supreme Court, in the Prize Cases, 2 Black, 635, 670, declare " was in itself official and conclusive evidence to the court that a *state of war* existed. See also Coleman *vs.*

Tennessee, 97 U. S. 509, 517. The principal maritime nations of Europe also made haste to recognize a civil war as existing to acknowledge the South as a *de facto* government, and to proclaim their neutrality in the contest.

Again, in our Revolutionary struggle, nearly all the European powers, except Portugal, which was dominated by English influence, acted in a friendly spirit and as *neutrals*, admitting our cruisers freely to their ports, and thus by implication recognizing our belligerency. Lawr. Wheat. note 16, p. 41; Ann. Reg. 1776, pp. *182, *183; *Id.* 1779, pp. 391, 409, 429. See references in United States Messages and Documents, 1861, p. 371. France, as early as 1776, expressly recognized our belligerent rights, and set at liberty a corsair arrested by procurement of the British vice-admiral (Ann. Reg. 1776, p. 261), while Portugal alone, by decree of June 4, 1776, refused us recognition, shut her ports to our merchantmen, and denounced confiscation of all our vessels found with contraband goods on board. *Id.* 260.

In all the revolts and struggles for independence by the Spanish-American colonies from 1810 to 1822 our Government, at an early stage of the contest, in every instance acknowledged the existence of a state of war and of the belligerent rights of our provinces, maintained an impartial neutrality, and admitted to our ports the vessels of war of each party. Message of President Monroe, March 8, 1822; Note to 4 Wheat. Rep. App. 23-59. It was the same in the Greek revolution (see dispatch of Mr. Adams to Rush, August 18, 1823; 2 Elliott, Dip. Code, 633), and the same in the
39 contest by which Texas acquired her independence of Mexico. *Id.* 643, 684. Greece blockaded the ports of Turkey; but England had already acknowledged her belligerent rights and declared her strict neutrality. 2 Stapleton's Life of Canning, 408, 414, 448.

These are among the most prominent revolutionary struggles of recent times. In all of them the revolutionists were speedily recognized as belligerents by foreign powers long before any recognition of them as independent states. Even England in her statute of 16 Geo. III, 1776, and in that of 17 Geo. III, 1777, which was renewed annually during the war, and which declared our privateers "pirates," recognized and declared the existence of a *territorial civil war* whereby we became "enemies" and "belligerents" as well as "rebels" (per Nelson, J., in Prize Cases, 2 Black., 694; Lawr. Wheat., note 79). In the long revolt of the Netherlands, Queen Elizabeth, from policy and religious sympathy, secretly aided the insurgents, and for twenty years, while professing amity with Philip, carried on a secret piratical warfare against him. Hosack, Rise, etc., of Int. Law, 153.

The foreign powers generally, says Lawrence (1 Com. de Droit, etc., 186), treated the Dutch corsairs as *belligerents*, though Spain

regarded them as pirates. Until recognition as belligerents, insurgents have usually carefully abstained from interference with the rights of third power. No instance has been called to my attention, and I have found none, though such cases may have arisen, in which insurgent leaders have undertaken to blockade ports to the exclusion of the legitimate commerce of all nations, prior to their obtaining any recognition of belligerent rights from abroad. All citations of supposed precedents that omit inquiry into this vital circumstance are likely to prove misleading.

Again, this is a suit *in rem* for the condemnation of the
 40 vessel only; not a trial upon a criminal indictment of her officers or crew. The two proceedings are wholly independent, and pursued in different courts. Condemnation of the vessel as piratical does not necessarily imply a criminal liability of her officers or crew. The vessel might be condemned for being engaged upon a piratical expedition only, or for attempts at piratical aggression or restraint. In such a case no indictment for piracy would lie, because criminal punishment is inflicted only according to the municipal law of the captors; and our statutes do not make criminally punishable piratical undertakings or aggressions merely. The *Marianna Flora*, 11 Wheat. 40; The *Palmyra*, 12 Wheat. 1, 15. Even as regards acts that constitute undoubted piracy, there may be valid personal defenses of the officers and crew, as suggested, though not decided by Marshall, *C. J.*, in *United States v. Klintock* (5 Wheat., 144, 149). If an owner should forge a commission from a lawful belligerent, and send his vessel out as a privateer under officers and crew who acted in good faith, supposing her commission to be genuine, the vessel should be condemned, though the officers and crew might be acquitted.

So if mere usurpers, knowing that they have no recognized authority, should commission their own ships as vessels of war to blockade loyal ports and to threaten the lawful commerce of all nations, and foreign merchantmen were captured or sunk by them during such a blockade, it is possible that the officers and crew might have accepted the commission upon such a reasonable supposition of its coming from an authorized belligerent as to furnish a just defense upon a criminal indictment, though none the less should the vessel and those who commissioned her be held engaged in an illegal and piratical expedition. See *United States v. Gibert* 2 Sum. 19. Here the court has to do only with the character and design of the expedition upon which the *Ambrose Light* was sent
 out by the insurgents who owned and commissioned her.
 41 And so far as respects the lawfulness of her seizure, the question is the same as if she had actually captured one of our merchantmen, or sunk her and killed the officers and crew while they were lawfully entering the port at Cartagena.

I. Piracy has two aspects: (*a*) As a violation of the common right of nations, punishable under the common law of nations by the

seizure and condemnation of the vessel only in prize courts; (b) its liability to punishment criminally by the municipal law of the place where the offenders are tried. Accordingly, the definitions of piracy, aside from "statutory piracy," fall naturally into two classes, according as the offense is viewed more especially as it affects the rights of nations, or as amenable to criminal punishment under the municipal law. The common law jurists, and our standard authors on criminal law, define piracy as "robbery on the high seas," or "such acts of violence or felonious taking on the high seas as upon land would constitute the crime of robbery." 1 Russ. Cr. *144; 1 Bl. Comm. *72; Whart. Crim. Law, § 2830; Sir Charles Hedges, 13 How. St. Tr. 454; Sir L. Jenkins, 13 Petersd. 349, note; Phil. Int. Law, 414.

The majority of authors on international law, however, define it substantially as Wheaton defines it, viz., as "the offense of depredating on the high seas without being authorized by any sovereign state; or with commissions from different sovereigns at war with each other." Mann. Int. Law, 160; Hall, Int. Law, 218, and note; Bac. Abr. 163; 2 Browne, Civ. and Adm. Law, 461. See numerous citations to same effect by R. H. Dana and [now Mr. Justice] Gray, *Dole vs. New England Ins. Co.* (2 Cliff. 394, 400), and note to 5 Wheat. 157.

In several cases in the Supreme Court, pirates are spoken of as synonymous with "persons not lawfully sailing under the flag, or deriving protection from the commission of any government or nation," (U. S. *vs. Smith*, 5 Wheat. 153, 163; U. S. *vs. Holmes*, Id. 412, 417; *The Malek Adhel*, 2 How. 211, 232); and the other common law definition is also frequently used.

Prof. Perels, in his recent work on International Maritime Law (Berlin, 1882), § 16, p. 125, defines piracy generally in substantially the same terms as Wheaton, giving afterwards some twelve different forms of the offense. Among these are included making captures under a commission after the commission has expired or after it is revoked or after knowledge that the war has ended, or outside the proper territorial limits of the war. *Piraterie*, § 16; *Caper*, § 34, pp. 186, 187.

Both the above general definitions, in most cases, lead practically to the same results. The latter is equally well established with the former, and is more appropriate in a case of prize. This definition makes piratical, and is intended to make piratical, all private, unauthorized maritime warfare. The reason is that all such warfare is incompatible with the peace and order of the seas, with due security for maritime commerce, or due responsibility for injuries to others. Ocean belligerency embraces the right to arrest, to visit, and to search the vessels of all nations; to seize contraband goods; to blockade ports; and, if need be, to capture or destroy the vessels of all nations that resist or violate the blockade. These are high prerogatives of sovereignty. 3 Phil. Int. Law, 2d Ed. 474; Lawr.

Wheat., Pt. 4, C. 1, § 5; Hall, Int. Law, § 178, p. 448; Wools. Int. Law, § 116. They are neither permitted to mere private persons, or combinations of persons, nor suffered by other nations at their hands.

Such private warfare is therefore everywhere held unlawful, and, as it involves the infliction of the highest injuries in the destruction of life and property, it is rightly held to be among the highest of crimes, and therefore piracy. There is no other offense that covers

it. It is either piracy or no offense at all. To show their
43 right to carry on such warfare, both privateers and public vessels of war are required to be duly commissioned by some proper authority, and to sail under their proper flags. One of the forms of piracy mentioned by Prof. Perels (Int. Mar. Law, § 16, p. 127) is "ships that sail without any flag, or without a flag sanctioned by any sovereign power, or that usurp a flag and commit acts of violence under it." And, again, "ships that carry on privateering without a commission." Section 34, viii, p. 185.

Accordingly, our statutes authorize both our public vessels of war and our merchantmen to resist and to capture all such vessels (Rev. Stat. §§ 4294, 4295). Our naval regulations provide (1876, c. 20, § 18): "If any vessel shall be taken acting as a vessel of war or privateer without having a proper commission so to act, the officers and crew shall be considered as pirates and treated accordingly." The same are the English naval regulations. Section 1861, Perels, Mar. Law, p. 185. A commission by unrecognized rebels is manifestly not "a proper commission;" and if such vessels, whenever "taken," can not be detained as piratical, these naval regulations are unlawful.

SEC. 5283. Every person who, within the limits of the United States, fits out and arms, or attempts to fit out and arm, or procures to be fitted out and armed, or knowingly is concerned in the furnishing, fitting out, or arming of any vessel, with intent that such vessel shall be employed in the service of any foreign prince or state, or of any colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace, or who issues or delivers a commission within the territory or jurisdiction of the United States, for any vessel, to the intent that she may be so employed, shall be deemed guilty of

a high misdemeanor, and shall be fined not more than ten
44 thousand dollars, and imprisoned not more than three years.

And every such vessel, her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores which may have been procured for the building and equipment thereof, shall be forfeited; one-half to the use of the informer, and the other half to the use of the United States.

SEC. 5285. Every person who, within the territory or jurisdiction of the United States, increases or augments, or procures to be increased or augmented, or knowingly is concerned in increasing

or augmenting, the force of any ship of war, cruiser, or other armed vessel, which at the time of her arrival within the United States was a ship of war, or cruiser, or armed vessel, in the service of any foreign prince or state, or of any colony, district, or people, or belonging to the subjects or citizens of any such prince or state, colony, district, or people, the same being at war with any foreign prince or state, or of any colony, district, or people with whom the United States are at peace, by adding to the number of the guns of such vessel, or by changing those on board of her for guns of a larger caliber, or by adding thereto any equipment solely applicable to war, shall be deemed guilty of a high misdemeanor, and shall be fined not more than one thousand dollars and be imprisoned not more than one year.

SEC. 4294. The President is authorized to instruct the commanders of the public armed vessels of the United States to subdue, seize, take, and send into any port of the United States any armed vessel or boat, or any vessel or boat the crew whereof shall be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation, or seizure, upon any vessel of the United States, or of the citizens thereof, or upon any other vessel which may have been unlawfully captured upon the high seas.

45 SEC. 4297. Any vessel built, purchased, fitted out in whole or in part, or held for the purpose of being employed in the commission of any piratical aggression, search, restraint, depredation, or seizure, or in the commission of any other act of piracy, as defined by the law of nations, shall be liable to be captured and brought into any port of the United States if found upon the high seas, or to be seized if found in any port or place within the United States, whether the same shall have actually sailed upon any piratical expedition or not, and whether any act of piracy shall have been committed or attempted upon or from such vessel or not; and any such vessel may be adjudged and condemned, if captured by a vessel authorized as hereinafter mentioned, to the use of the United States and to that of the captors, and if seized by a collector, surveyor, or marshal, then to the use of the United States.

CHARGE OF JUDGE JUDSON ON THE TRIAL OF THE CUBAN EXPEDITIONISTS IN U. S. *vs.* O'SULLIVAN ET AL., SOUTHERN DISTRICT OF NEW YORK. REPRINTED FROM NOTE 1 TO SEC. 2802, WHARTON'S CRIMINAL LAW, 4TH EDITION, 1857, CITED WITH APPROVAL BY LEAVITT, J., IN U. S. *vs.* LUESDEN, 1 BOND, P. 5 (1856, SOUTHERN DISTRICT OF NEW YORK), AND BY JUDGE MAXEY, IN U. S. *vs.* YBANEZ, 53 FEDERAL REPORTER, P. 536 (1892, WESTERN DISTRICT OF TEXAS).

The cause now to be committed to you is that of the United States against John L. O'Sullivan, Lewis Schlessinger, and A. Irvin Lewis, all of whom have been arrested. Schlessinger having given bail does not appear, and the case goes on against O'Sullivan and Lewis. The indictment is found on the 6th section of an Act of Congress, passed April 20, 1818.

The section is in the following words:

"That if any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide or procure the means for any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign Prince or State, or of any colony, district or people, with whom the United States are at peace, every such person so offending shall be deemed guilty of a high misdemeanor."

The indictment contains ninety-seven counts, setting out in different forms the offence supposed to have been committed against this act. These various forms of declaring are adopted for the purpose of meeting the phraseology peculiar to this act; at the same time it is not claimed that more than one offence has been committed. You will, therefore, be unembarrassed with these matters of form. The 10th count must be laid out of the case. In the disposition of this case much depends upon the proper construction of this act of Congress; and on this subject we are to be governed by established rules; and so far as I have been able to investigate the matter, we shall have no occasion to seek out any new or untried rules for our guide. And first of all, it is an undeniable proposition that all penal statutes are to receive a strict construction. This is a penal statute, and it falls within this rule. The terms used are not to be extended beyond their natural import, to fix an offence on the defendants; but this rule, on the other hand, does not require any such construction as to fritter it away, and defeat its object, and annul the law itself. I will then state to you in the outset some of these essential rules, and point out their application. We are to look at the spirit, intent, and object of a law—what mischief it was intended to prevent, and in what manner the remedy is to be applied? What, then, is this law? Its great object—the all-prevailing object of this law—is peace with all nations—national amity—which will alone enable us to enjoy friendly intercourse and uninterrupted commerce, the great source of wealth and prosperity—in short, to

prevent war, with all its sad and desolating consequences. These being the objects of this law, they are sufficiently important to arrest the attention of both court and jury, and secure to the United States and to the accused, a fair and impartial trial.

Before the jury can convict on this indictment, it must be proved to their satisfaction that the expedition or enterprise was in its character military ; or in other words, it must have been shown by competent proof that the design, the end, the aim, and the purpose of the expedition or enterprise, was some military service, some attack or invasion of another people or country, state, or colony, as a military force. The engagement of men to invade or attack any other people or country by force and strong hand—the designation of officers—the classification and arrangement of men into regiments, squadrons, battalions, or companies ; the divisions of the men into infantry, cavalry, artillery, or rifle-men ; the purchase of vessels or steamboats—military stores—such as powder or ball—for an expedition, give character to the expedition itself, provided that there is sufficient proof to satisfy the jury that they are to be used.

But any expedition or enterprise in matters of commerce or of business, of a civil nature, unattended by a design of an attack, invasion or conquest, is wholly legal, and is not an expedition or an enterprise within this act. A colonization, expedition or enterprise is not unlawful. It contemplates only a peaceful settlement, without intention or design to make war upon people, or to overturn their government.

To constitute a misdemeanor under the law of 1818 there must have been a hostile intention connected with the act of beginning or setting on foot the expedition. This intended hostility, or this intended peaceful movement, characterizes the act of beginning or setting on foot an expedition. The one makes it military, and the other makes it colonization. How this distinctive character shall be shown depends on the proof. A vessel, armed and equipped, with all the implements and munitions of war, with men organized into companies, might be a striking spectacle ; but even then we should enquire of the proof, what they were to do, and what their destiny was. Without such qualifying proof it might still be lawful, but with it the military character might be established. In this sense, declarations of intentions would do much to develop the real object, and the object is the great thing to be sought for. A specious covering, an artifice, secret movements, or deceptive proceedings, may aid in fixing the true character of any act. These remarks lead me to the consideration of such acts as are penal under the law of 1818. The term “ expedition ” is used to signify a march or voyage with martial or hostile intentions. The term “ enterprise ” means an undertaking of hazard, an arduous attempt. “ Begin ” is to do the first act ; to enter upon.

We may say, with all propriety, that to begin an enterprise is to take the first step ; the initiatory movement of an enterprise, the very

formation and commencement of an expedition. "To set on foot" is to arrange, to place in order, to set forward, to put in way of being ready. Then "to provide," is to furnish and supply, and "to procure the means" is to obtain, bring together, put on board, to collect. After all these proofs are made out the prosecution must further show that the beginning, setting on foot, or the providing or procuring materials for such an expedition or enterprise, were within the territory or jurisdiction of the United States, and to be carried on from thence, against the territory or dominions of some foreign prince or state, colony or district, or people, with whom the United States were at peace. You will see by a careful attention to this law, that there are four acts which are declared to be unlawful, and which are prohibited by the statute. To "begin" an expedition—to "set on foot" an expedition—to "provide" the means for an enterprise; and lastly to "procure" those means.

It is not necessary that all these distinct provisions shall be violated to constitute the offense; the proof of either one of them will be deemed sufficient. These are put in the alternative. As an illustration of what has been said thus far, I will remark that to purchase, charter, repair, or fit up any vessel or steamboat; to procure and put on board such vessel or steamboat, power, ball, firearms, military stores, ship stores, or any of them, to be used at any place in contravention of, and with an intent to violate this act, is proper evidence; to enlist, engage verbally, or contract with men as officers, soldiers, or musicians to go out on such an expedition, as I have defined, may be considered by the jury, as providing and procuring the means of a military expedition and enterprise, and if the proof shows the additional fact, that these means were provided and procured for a military expedition, or enterprise, then it is your business to consider such acts as falling directly within this law. It is not essential to the case that the expedition should start, much less, that it should have been accomplished. To "begin" is not to "finish." To "set on foot" is not to accomplish. To provide and procure power is not to put to it the match, or the percussion. It is not necessary that the vessel should actually sail, nor is it necessary that war should exist between the nation on which the descent is to be made, with another nation. The counsel for the defense, in the course of the argument, have laid down several important propositions of law, of which I have been called upon to speak to you. They put forward this as the leading proposition, to wit:

I. "The jury are judges of the law of the case." This question has been argued at great length and with great zeal, enforcing upon you the propriety of adopting this as a rule of our proceeding. Now, why is this? The law is not so—the law never was so in the United States courts—and I think I may safely add, that it never can be so. I refer to the opinion of the late Judge Story, and especially to a very late opinion of Judge Curtis, one of the judges of the Supreme Court of the United States, which has been

read to us. These opinions settle the matter, that the court is to judge of the law, and that the jury are to understand the law as it is pronounced by the court. Judge Thompson always so held in this circuit—so, I believe, in all the other circuits. No principle can be better settled, or more universally acquiesced in. It is no advantage to the jury to possess this power, and any attempt to exercise it, is a direct violation of the oath of the jury. What has surprised me is, that counsel, with all the knowledge of these decisions, should argue for hours that this is not law. Yet we have heard of such arguments here, and it becomes my duty to tell you that no countenance can be given to the proposition. But I think it requires and deserves the unqualified disapprobation from the place which I occupy.

II. "This expedition, whatever it might have been, had never gone forth." Now, gentlemen, this proposition is not the law of the United States, which you have sworn to support. The statute does not require that the expedition should go out, and the decisions which I will soon read to you will settle this in like manner.

III. "That the law of 1818 is a neutrality law merely, and designed only to apply to a state of war." Well, this proposition must stand also corrected by numerous determinations which I will incorporate into my remarks. Again it is said, that,

IV. "The law of 1838 shows that the law of 1818 could not operate." The law of 1838 was a temporary law, adapted to the peculiar condition of the Northern frontier; and a new rule of evidence was introduced, founded on probable cause alone, as sufficient authority to seize and stop the incursions into the Canadas—then by this law of 1838, a new set of officers were vested with the power to take possession and stop the invasion. It is, therefore, inapplicable, and may be laid out of view.

V. "If convicted, these defendants are to be sent to the State prison." This is not so. These varied propositions of the law cannot be sustained by this court. I will have you distinctly understand that the defence cannot be aided by these propositions—they will afford no security to the defendants, and I think it peculiarly unfortunate that the defence should be placed on grounds so untenable. And I shall here entreat you by no means to hazard the cause of the defendants upon such grounds. Gentlemen of the jury, you will see now by what follows, that all these questions of law have been settled, leaving nothing for me to do except to acquiesce in the law as it has been declared and pronounced by all the learned judges in the United States, who have passed upon the questions. The decisions have been uniform, and surely it would be worse than presumption in me, even to question what has been thus established, by such high and ample authority. My business is to pronounce the law as it is, and it is yours so to receive it, and be satisfied. I hold in my hand the able opinion of Hon. Judge Betts, delivered after full argument

on this very indictment, delivered from this bench last July. Every question of law raised on this argument was then decided. How can I reverse that judgment? You know who pronounced it, and the great weight to which it is entitled, from the long experience and great learning of that judge. I find, also, by the report itself, that these questions have been submitted to the learned judge of the Supreme Court, who presides over this circuit, that he concurs in the law as there ruled; and, of course, it has become the law in my district, as well as in this, and while it stands unreversed, it is the law of the Union. I cannot stop here to read the whole report, but I will read in your presence a few extracts:

"This is all I deem to be necessary to be said in this connection in relation to the views of the Executive Department of the Government, antecedent and subsequent to the passage of the law, (and in this respect the acts of 1794 and 1818 may be regarded as identical), showing that it was called for and always accepted and enforced as a law, no less of non-interference by our citizens by military expeditions against nations at peace with all the world, than one prohibiting acts of hostility in favor of any belligerent power against another in peace with the United States. This topic, however, being the one on which the defendants chiefly rely, they insisting the Act of Congress does not apply to the facts alleged against them, and the question being of great public moment to our own citizens, and in our relations with foreign governments, it is meet the subject should be considered under other aspects. And I think the import of the law collected from its face, according to the established rules of interpretation, plainly denotes the intention of Congress to stamp as crimes acts done within our territories, designed to violate the peace and rights of a friendly people, whatever may be the relation of such people in respect to other nations. The cardinal consideration is, are they in amity with the United States, and, if so, no person shall be permitted within our jurisdiction, to take any warlike measures designed to disturb that peace."

"I see no mode of satisfying this language, but in holding it comprehends all the acts denounced, when committed within the United States, against a friendly power, without respect to his relationship to other powers. This, it appears to me, has been the acceptance in which the act has been received by our judges and most eminent jurists since its enactment."

"It is no part of the description of the offence that the expedition or enterprise shall have left the United States, and, accordingly, it can be of no essential importance to allege the particular point contemplated for its departure."

The guilty purpose must be proved, and the guilty acts to be all done within the district of New York, and it no way qualifies or affects the character of these particulars, whether the defendants intended to put off the expedition at Castine, or Galveston, or any intermediate point.

I have occasion to refer again to the opinion of Judge Betts, contained in his charge to a grand jury of this district, and the legal argument which it embraces, is so much in accordance with my own views, that I deem it proper to make it a part of my charge.

The clerk will oblige me by reading it.

"The act of Congress of April 10th, 1814, [April 20, 1818] prescribes the laws of neutrality which our citizens are bound to observe in regard to foreign nations. The provisions are stringent, but no more so than comports with the high character for justice and good faith towards others, which it is the policy and aim of this Government to maintain. In leaving to every citizen as an individual, the undisputed right to expatriate himself, at his own option, and connect himself with any other nation or people, this Government still possesses the unquestionable power to prohibit that citizen, individually, or in association with others, entering into engagements or measures, within the American territory, or upon American vessels, in hostility to other nations, and which may compromise our peace with them. It would be most deplorable if no such controlling power existed in this Government, and if men might be allowed, under the influence of evil, or even good motives, to set on foot warlike enterprises, from our shores, against nations at peace with us, and thus, for private objects, sordid or criminal in themselves—or under the impulse of fanaticism or wild delusions—bring upon this country, at their own discretion the calamities of war."

"The will of the nation is expressed, in this respect, by the statute of April, 1818. It attempts to guard against the infraction of the peace and rights of friendly powers by our own people, or by acts done within our territory, by inhibiting therein all proceedings of a warlike purpose, or tendency, against any foreign government, or people, with whom the United States are at peace. The only provisions of the statute, which come within the scope of your inquiry to the court, and to which your attention should be addressed are contained in the 6th section. The sixth section makes it a high misdemeanor for any person within the territory or jurisdiction of the United States to begin or set on foot, or provide, or prepare the means for any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign power or state, or of any colony, district, or people, with whom the United States are at peace."

"This language is very comprehensive and peremptory. It brands as a national offence the first effort or proposal by individuals to get up a military enterprise within this country against a friendly one. It does not wait for the project to be consummated by any formal array, or organization of forces, or declaration of war; but strikes at the inception of the purpose, in the first incipient step taken, with a view to the enterprise, by either engaging men, munitions of war, or means of transportation or funds for its mainten-

ance; and even further, it is not necessary that the means shall be actually provided and procured. The statute makes it a crime to prepare those means. This would clearly comprehend the making ready and the tender or offer of such means to encourage or induce the expedition; and may probably include also any plan or arrangements having in view the aid and furtherance of the enterprise. Under this provision of the law, you will, therefore, inquire carefully whether any person or persons have been concerned within this district in getting up a hostile expedition against the island of Cuba; whether by them, or through their agency or influence, men have been secured, enlisted, or employed, to carry it on; whether munitions of war, money, or transport vessels have been provided here for that object; and if the facts in proof fasten on any individual a participation in such acts it is your duty to indict him for the violation of this statute, and present him for trial before this court. It must be manifest to you, gentlemen, that these criminal designs, if undertaken, will be managed with much disguise and caution; it is not probable that soldiers will be openly enlisted, or officers commissioned, or vessels freighted to transport munitions of war, or men to the field of action. Pretences and coloring will be employed to mask the real object the parties to such criminal projects contemplate. But if you discover the purpose really to be to supply the means of hostile aggression against Cuba, then all persons connected with it, and promoting it, will be answerable for the violation of the laws of the United States in the undertaking, the same as if their proceedings had been openly and avowedly intended for a hostile invasion, and waging war on that community."

Superadded to this authority (continues Judge Judson), which alone would be conclusive on me, we have the opinions of Judge M'Lean, Judge Catron, Judge Story, Judge M'Kinley, and Judge M'Caleb, all to the same point, fully and powerfully sustaining the decision of Judge Betts. I think I may say to you, with entire confidence, that the law is well settled, that the acts charged in this indictment fall within this law, and that the proper defence to be urged before you was, that the government have failed to prove the allegations in the indictment, and there the defence must rest. These are wholly questions of fact, belonging to the jury; and I am the last person to invade your rights, or to interfere with your exclusive privilege in weighing the testimony in all criminal cases. I would not, if I could, do that, because there is a sufficient responsibility on me, without assuming yours. No, gentlemen, you are left free to be influenced by your own convictions of duty, in weighing this evidence. If, upon your oaths, you can say that the facts in this case are not true, then it will afford me unspeakable pleasure to hear the verdict so pronounced, because I confide this part of the case to you, and you must be responsible to your own consciences for the result. But, before this case is committed to your deliberation, it may be proper

to allude to an appeal that has been made to you, which certainly requires a trifling notice. It is said here, that there has not been a conviction upon this act, by any jury. This is the appeal; and the recent trials at the South, are relied upon as guides for you also. But, gentlemen, it was no fault of the law that an acquittal took place there. The fault was elsewhere; and I should tell you that the fault rested with the jury, precisely as it did many years ago in Georgia, when the much lamented Whitney sought, in that State, to recover for a wanton interference with his rights. The law was in his favor; it was so pronounced by the court, over and over again; yet he could not have a verdict for the redress of his great wrongs, because the jurors were influenced by their interests, and by their prejudices, to have the law thus violated. The State herself was dishonored, and the jurors must have lived to feel the sting of remorse.

But, again, it has been said that Colonel Burr was not convicted of treason, and could not be convicted under the act of 1794, for a high misdemeanor. He was indicted in the District of Columbia, instead of the State of Ohio, where the crime was committed. He ought to have been indicted in the right district, and there he might have been convicted. I may be excused in a passing remark regarding what has been said by the counsel for the defence, as to the District Attorney, his preparation and management of this cause. The term used, as you will bear me witness, were unusually severe, harsh, and reproachful, such as are not often heard in a court of justice. I am induced to this for the sole reason that I fear you may suppose, from my silence, that the attack was to be justified by the circumstance of the case. Personal assaults like these should not be made, unless there shall be found a clear warrant for them, in both the conduct and motive of the person assailed. It has been my fortune to have known the District Attorney from his youth. He is a native of my own county, born and reared up in a town adjoining that of my birth-place. He was prepared for college life in the village where I live. When he presented himself for admission at our bar, it was my lot to examine his qualifications; and as we there had an old-fashioned requirement of good character, he was reported to the court by me as being, in this particular, above all suspicion or reproach. I well remember how joyfully we received him into our fellowship, and with what entire confidence he was received and cheered onward by the public confidence. At the May session of our legislature, in 1823, though much my junior, he was my successor to an honorable post in that body. But he left it for a more ample field, and found it in your city, where he is well known to you all, as a high-minded member of the profession, incapable in his nature of intentional wrong to any human being. Since then, I have only seen him once or twice, until the fall of 1850; but I have not been ignorant of his high position here, earned, as it has

been, by a life of honorable toil. Others there may be, who have entitled themselves to as good a name, and to an equal share of public confidence, but there are none who can, for themselves, claim a better fame, or a more honorable post in the profession; and nothing in the course of this trial has shaken, in the least degree, my confidence in his honor and integrity. Judge ye, whether the remarks to which I have here alluded, were just in their application, or worthy, of the source from whence they came. There is another incident of this trial, which still lingers on my mind; but as it was a matter of personal rather than a public concern, I have some delicacy in taking the least notice of it. But, gentlemen, our relations thus far have been so friendly, that I confess I have a strong desire to carry home with me your good wishes, and for that purpose alone I may be indulged in saying, that you all must remember that while the senior counsel was opening the defence, by an attack on an officer of this court, and after he was denounced in unmeasurable terms, according to the views of the speaker, you were told, "that the court sanctioned the unlawful expedition on the Treasury of the United States." You will remember, also, that every eye, except that of the speaker, was fixed on the point of personal assault. You may remember, too, that the object of that attack, bitter and unkind as it was, sat in silence. A week has elapsed, and still the shaft is left. When this case is over, I expect to leave you, perhaps forever; and as I desire to carry back to my home your friendship and confidence, there is but one favor to be sought at your hands. For this reason I invite the jury to place these unmerited remarks by the side of the testimony of Burtinett, and let them both be stricken from the case. Perhaps, you may say, that it was my duty to have stopped all that portion of the argument which related to the law of the case, as was done recently by one of the most learned judges of the Supreme Court, Judge Curtis. Perhaps I should have done so; but on a moment's reflection, you will see why I let the argument proceed. This is not my own judicial district; and as I am here in obedience to the law which has called me, and am a stranger to the jury, I did not wish even to appear to assume power which others might suppose belonged to you. I have heard it all. And again, I was equally disposed to give to these defendants every benefit of what their counsel might, by any possibility, conceive for their benefit. Hence the indulgence has been cheerfully granted; and I repeat, what cannot be too often repeated, that the defendants are entitled to every reasonable doubt arising out of the testimony. Now, gentlemen, I have endeavored to dispose of many of the difficulties and embarrassments which have hung around this case, and in some measure obscured the real merits, which are indeed so important to those defendants, and to the country. In this humble effort, I hope that I may have aided you, and rendered your task somewhat less responsible. My wish and my object have

been, to render the case less complicated and more simple—to present to you only the real question to be tried. It is a question of fact merely. Give yourselves no trouble and no anxiety about anything else but the facts in the case. Have the allegations in this indictment been proved? This is all. This cause is put to you to be decided on its own merits—on the truth of the allegations contained in the indictment, as they are laid, in one or any of the counts, except the nineteenth. You will, of course, remember that you are a New York jury, empaneled here, and not in New Orleans, nor in Mississippi—knowing, as you do, that your verdict must be according to the evidence given in court. A single word as to the facts:

I. From the evidence, you must be satisfied, beyond any reasonable doubt, that persons were combined to begin, or set on foot a military expedition in the city of New York, to be carried on from thence against a territory with which the United States were at peace.

II. If, from the evidence, you find such a combination or agreement to have been made, or understood by them, then what any one of those persons may have said or done in relation to the expedition, becomes evidence against all.

III. The proof must establish in your minds, that the expedition or enterprise was a military enterprise, and evidence showing that the ends and objects were hostile or forcible against a nation at peace with the United States, then it is, to all intents and purposes, a military expedition.

IV. The prosecution is bound to prove that the act of beginning, or setting on foot, or that the means were provided or procured within the Southern District of New York.

V. You must be satisfied, from the evidence, that these defendants have done these acts, or participated in their being done, before you can return your verdict against them.

The testimony is now before you, and that portion of it which has been presented through Mr. Johannisson, the interpreter, in a manner acceptable to both parties, requires your careful attention. To show you the important principle involved in the invaluable right of a jury trial, and as that right is to be preserved inviolate, I shall leave the evidence in your hands, without naming a witness, or commenting upon any of the testimony, either written or parol. It is your province to weigh that evidence and apply the law as now construed to that testimony, and return your verdict accordingly. Prejudices you should have none; they are unworthy of such men, and such a cause. Partialities you cannot entertain, because your oath forbids their indulgence. You are not to convict or acquit, because those accused are great men, or small men, but only because the evidence of the case makes your duty plain. The law is no respecter of persons, and the glory of our land is, that in the hands of an upright jury, the administration of justice

reaches the high and the low, the rich and the poor, with unerring equality. The law never punishes to inflict a wound. The real objects are, to reform the individual, and to prevent others from like offenses, so that life, property, and character may be made secure. To conclude, I will only say, do your duty to the Government—do your duty to the accused, without fear or favor of any man—protect the innocent, but punish those who may have violated your laws. Let the evidence in court and your conscience be your guide. This will give you rest and peace.

APPENDIX V.

JUDICIAL PROCEEDINGS DURING THE PRESENT
INSURRECTION IN CUBA.

RECENT JUDICIAL PROCEEDINGS IN PROSECUTIONS BY
THE UNITED STATES UNDER THE NEUTRALITY
LAWS GROWING OUT OF ATTEMPTS TO AID THE
CUBAN INSURRECTION.

UNITED STATES V. PEÑA ET AL. 69 FEDERAL REPORTER, P. 983.

(September 23, 1895. District Court of U. S., District of Delaware.)

WALES, District Judge (charging jury.)

The defendants, Braulio Peña and the 20 other persons who are named in this indictment, are charged with having violated section 5286 and section 5440 of the Revised Statutes of the United States. These sections read as follows:

"Sec. 5286. Every person who, within the territory or jurisdiction of the United States begins, or set on foot, or provides or prepares the means for any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years."

"Sec. 5440. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than three years."

The indictment contains 37 counts, which have been framed in such manner as to cover the specific and alternative offenses described in the law. Several of the counts in the indictment, as it was originally returned by the grand jury, were found to be defective on being demurred to, but sufficient remain to put the defendants on trial. The counts for a conspiracy have not been pressed, and, indeed, no separate or distinct evidence was produced in support of them. The charges against the defendants are of a grave and important character involving serious consequences to themselves, if proved, and directly affect the good faith of the government of the United States in preserving inviolate its treaty obligations and the laws of comity existing between all civilized countries. It will be your duty, therefore, to carefully examine and consider the testimony which you have heard, and to decide fairly and impartially on the guilt or innocence of the accused. And in order to assist you both

in the investigation of the facts and in their application to the law of the case, the court will first direct your attention to the meaning and purpose of section 5286, which has just been read to you. Briefly, this section is a portion of what is known as the "Neutrality Act," which was passed by Congress as far back as April 20, 1818, and was, in fact, a declaration on the part of the government that it would, so far as its authority extended, prevent any part of its territory from being used as a basis for hostile military operations against any nation or country with which it was at peace. From the date of its passage to the present time many occasions have arisen calling for the enforcement of the law, and the government has always been vigilant and prompt, as it has been in the case now before us, in bringing parties accused of violating any of its provisions to trial. Not only the judicial branch, but also the state department, of the government, and its diplomatic representatives, have been frequently engaged in the interpretation of this act, so that its provisions may be said for the most part to have received a settled construction. And this remark applies particularly to section 5286. This section is designed to prohibit the beginning or setting on foot, or providing or preparing the means for, any military expedition or enterprise within the territory of the United States, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony or people with whom the United States are at peace.

The first count in the indictment is a general one, following the language of the law. The successive counts specify the different modes and ways by and in which the defendants are alleged to have violated the law, but you will notice that each count charges either that the defendants began, or set on foot, or provided the means for a military expedition or enterprise to be carried on against the dominions of the king of Spain, or against the Island of Cuba, "then and there being the territory of the king of Spain." This section of the neutrality act does not prohibit the shipping of arms, or ammunition or of military equipments to a foreign country, nor does it even forbid one or more individuals, singly or in unarmed associations, from leaving the United States for the purpose of joining in any military operations which are being carried on between other countries, or between different parties in the same country. In such cases the shipper and the volunteer would run the risk, the one of the capture of his property and the other of the capture of his person. But in neither case would there be the setting on foot or providing the means for carrying on a military expedition from the territory of the United States within the meaning of this section. With this instruction as to the design and scope of the law your inquiry will now be directed to the evidence which has been produced to establish the guilt of the defendants. In the first place you will take notice of the proclamation of the President of the United States,

dated the 12th day of June, 1895, which recited the existence in the Island of Cuba of "serious civil disturbances, accompanied by armed resistance to the authority of the established government of Spain, a power with which the United States are and desire to remain on terms of peace and amity." The proclamation also recites the substance of section 5286, which prohibits the citizens of the United States, as well as all other persons within and subject to its jurisdiction, from taking part in such disturbances adversely to such established government, . . . "by setting on foot, or providing, or preparing the means for military enterprises to be carried on from the United States against such government." The proclamation concludes by warning all such citizens and persons to abstain from every violation of the law referred to, and enjoins upon all officers of the United States charged with the execution of the law the utmost diligence in preventing violations thereof, and bringing to trial and punishment any offenders of the same. And here, gentlemen, it is proper to observe that, whatever may be the immediate outcome of the present trial, the prosecuting officer has done no more than his duty in preferring these charges, and in bringing the defendants before a jury to ascertain their guilt or innocence. Not to have done so would, perhaps, have amounted to official delinquency, for there were, at least *prima facie*, strong grounds for believing that the defendants had subjected themselves to the penalties of the law. It is now for you to decide whether they have done so or not.

The proof shows that on the 29th day of August, in the present year, the defendants assembled in Wilmington, and under cover of night went on board the tugboat Taurus, lying at Market street wharf, in the Christiana, and which some one of their number had previously chartered. On the same night they shipped on board the tug 27 boxes of freight, some of which had been brought from Philadelphia by Bush & Sons' Company, and the others had been carried from the store of De Soto Bros., in Wilmington, by the Charles Warner Company. The captain of the tug was ordered by Ralph De Soto, one of the defendants, to go out into the Delaware river, and to steam up and down the river between the mouth of the Christiana and Gordon Heights, until he should hear the signal of three whistles from a steamship outward bound, when he was at once to run the tug alongside, and trans-ship the boxes. The tug went back and forth on the river until long after daylight on the morning of the 30th of August without hearing any signal from the expected steamship, and until the agent of the owners of the Taurus came on board at Gordon Heights and, fearing that he had done wrong in hiring the tug to the defendants, directed them to give it up. At the request of the defendants, some of them, with their boxes of freight and with their personal effects, were landed at Pennsgrove in New Jersey. Here the boxes were left

on the pier, to be forwarded to the address of De Soto Bros., Philadelphia, while the defendants were waiting for a passage to the same place, either by boat or railroad. The tug Taurus had just left the pier when the tug Meteor appeared, having on board the United States marshal for the district of Delaware, accompanied by a strong force of deputies. The marshal ordered the Taurus to turn back. The boxes were seized and placed on the Taurus, and brought to Wilmington. The defendants were arrested by the marshal without any warrant, but they made no resistance, and entered no protest. The contents of the boxes, on examination, were found to consist of rifles, carbines, ammunition, haversacks, canteens, etc. There were no names or marks on the boxes to indicate to whom or where they were to be delivered. On a hearing before a United States commissioner the defendants were held to bail for their appearance at the coming term of this court.

Such, gentlemen, is the history of this case, as far as the evidence goes. There is no proof that the boxes were to be sent to the Island of Cuba, or that the defendants intended to take passage on an outward-bound vessel, which was destined for the same place. All that depends upon conjecture and suspicion only. In fact, there was some evidence to negative any such inference. You will remember that, on the 29th of August, three steamships cleared at the port of Philadelphia for the West Indies, namely, the Holquin, for Port Antonio; the Laurodo, for Port Moran; and the Buckminster, for Havana. The Laurodo, in consequence of needed repairs to her boilers, did not sail until the 3d of September, but her captain and owner testified that they had no knowledge of any contract or arrangement to take men or freight on board after leaving Philadelphia. There is also an absence of evidence of any agreement or understanding being had with the master or owner of either of the other vessels. On this proof you have to say whether the defendants, or any of them, are guilty in manner and form as they stand indicted; that is, did all or any of them begin or set on foot, within the jurisdiction of the United States, or provide or prepare the means for, any military expedition or enterprise, to be carried on from thence against the dominions of the king of Spain? The suspicious movements of the defendants on the night of the 29th of August, the devious and mysterious manner in which the arms and ammunitions were brought to Wilmington, and taken out on the Taurus, to be transhipped to an unknown outward-bound steamer from Philadelphia, the omission of the defendants to make any explanation of their designs,—all these circumstances may reasonably excite suspicion of wrong doing. The appearance of the defendants, their nationality, their silence under arrest, the fact of an existing insurrection in Cuba, and the belief that they are in sympathy with the insurrectionary party, unsupported by other evidence, would not be sufficient to warrant a verdict of guilty. Before you can find such a

verdict, you must be satisfied beyond a reasonable doubt by the proofs in the case—First, That the defendants, within the jurisdiction of the United States, began or set on foot, or provided the means for a military expedition or enterprise. Second: And that such expedition or enterprise was to be carried on from the United States against the territory or dominions of the king of Spain. A military expedition or enterprise means a military organization of some kind, designated as infantry, cavalry, or artillery, officered and equipped, or in readiness to be officered and equipped, for active hostile operations; and the preparing the means for such an organization would undoubtedly come within the inhibition of the law. But this would constitute only one element or part of the offense charged against the defendants. To complete the offense, it must also be proved that the means were provided within the United States, and that the expedition was to be carried on from thence against the dominion or territory of the king of Spain.

You have heard the evidence, and the court has now given you such instructions in reference to the meaning of the law as will enable you to form a right decision on the facts; it is only necessary to add that you must not allow public opinion or popular sympathy to influence your deliberations. A people struggling for freedom always attracts the admiration and awakens the ardent wishes for its success of the citizens of this republic, but thus far, in our history, it has been the policy of our government to abstain from rendering any active or material assistance to either party or faction in such contests, and the United States are bound by the most sacred obligations to prevent its own citizens or any other persons from making use of its territory for hostile operations against any government with which we are at peace. You have already been informed that the conspiracy counts have not been pressed by the district attorney, and you are now further instructed that, unless the defendants shall be found guilty on one or more of the other counts, they cannot, on the same evidence, be convicted of a conspiracy.

1 In the Circuit Court of the United States, Southern District of Florida.

UNITED STATES }
 ^{vs.}
 E. G. RILEY. }

Testimony taken before Julius Otto, Esq., United States Commissioner, at Jacksonville, Florida, July 3rd, 1896. 10.30 A. M.

Appearances:

HON. FRANK CLARK, U. S. District Attorney, and R. H. LIGGETT, for the Prosecution.

J. M. BARRS, Esq., Attorney for the defendant.

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3 FRANK WILLIAMS, a witness on behalf of the Government, being duly sworn, deposes and says:

By Mr. CLARK:

Q. Where were you born? A. Germany.

Q. How long have you lived in this country? A. Three years.

Q. Where have you lived during those three years; where is your home? A. Nowhere; I have got no home; I have been sailing on this coast—the American coast—the last three years.

Q. You are a sailor? A. Yes, sir.

Q. Do you know the defendant, Edward G. Riley? A. Yes, sir.

Q. Where is he?

(Witness points to defendant.)

Q. Where did you first meet him? A. Aboard the "Bermuda."

Q. What is the "Bermuda?" A. A steamboat.

Q. Were you employed on the "Bermuda?" A. Yes, sir.

Q. In what capacity? A. Sailor.

Q. Where did you first go on the "Bermuda" as a sailor? A. New York City.

Q. When did you first go on board of her as a sailor? A. About February—middle of February, 1896—this year.

Q. Where was she when you went aboard of her? A. She was in New York harbor.

Q. Who employed you as a sailor aboard the Bermuda? A. I was shipped by shipmaster, Capt. O'Brien, of New York.

Q. What was said to you, if anything, at the time of your employment as to the business the Bermuda was to engage in? A. Nothing.

Defendant's solicitor objected to this question, unless the Government connect Capt. Riley, the defendant, with it.

Mr. CLARK: The witness answered "nothing."

Q. After you were shipped aboard the "Bermuda" what time did you go aboard of her? A. I don't know exactly the day, the middle of February, afternoon about 2 o'clock.

Q. When you went aboard who was master of the "Bermuda"? A. No master whatever; I didn't know the master; the captain

wasn't on board when I went on board, and I think he came afterwards, about 10 o'clock I seen him first; I didn't know his name.

Q. How long did the vessel remain in New York harbor after you went aboard of her? A. About 3 weeks.

Q. Do you know how many composed the crew? A. About thirty.

Q. When she left New York harbor where did she go? A. Left New York harbor to go to Cuba.

Q. From there where did she go? A. Porto Cortez.

Q. Then where? A. Back to Philadelphia.

Q. What time did the vessel reach Philadelphia? A. About the 14th of April last.

Q. How long did she remain in Philadelphia? A. About eight days.

5 Q. Did she leave Philadelphia then, after eight days? A. Yes, sir.

Q. Who was the captain of that vessel when she left Philadelphia at that time? A. Capt. O'Brien.

Q. When she left Philadelphia at that time did she have any cargo? A. No cargo whatever except three boats additional to the boats we had on board.

Q. Three boats additional to the ship's boats? A. Yes, sir.

Q. Where were those boats taken on board? A. On the Delaware river.

Q. How were they taken on board? Just tell all about it. A. We dropped our anchor, but couldn't get them to work, didn't work exactly, and a tugboat came alongside, and they hoisted them and put them on deck.

Q. Who was on board that vessel at that time beside the captain and the boat's crew? A. Nobody.

Q. When you left Philadelphia did you have any cargo other than the three boats additional to the ship's boats? A. No, sir.

Q. Did you have any persons aboard except the captain and the crew? A. Three passengers.

Q. Who were they? A. I don't know their names.

Q. Of what nationality were they? A. Americans.

Q. Where did you go from Philadelphia? A. To Jacksonville, Florida.

6 Q. At what time did you reach Jacksonville? A. The following Sunday about 6 o'clock in the evening, came to the entrance of the river.

Q. This river here? A. Yes, sir; St. John's.

Q. Had you stopped at any point between Philadelphia and Jacksonville? A. No, sir.

Q. Did you come right into the river, or did you remain outside? A. Remained outside for awhile, not long.

Q. Did any person come to you when you were outside, come to the ship? A. No, sir; except the pilot.

Q. When you left the entrance of the river where did you go?
A. Right inside, and dropped anchor up side of the big wharf here; I don't know the name.

Q. Right abreast of the city here? A. Yes, sir.

Q. You dropped anchor there? A. Yes, sir.

Q. What was done then? A. It was about eight o'clock, and we waited till about 10.

Q. You worked until about 10? A. We waited—we finished work and made everything ready to take on cargo; finished about 8 o'clock; from 8 to 10 o'clock we had been waiting, and at 10 o'clock a lighter came alongside with arms and—

Q. Before that lighter came alongside had any persons come aboard the ship? A. Not as I know.

Q. You had seen none? A. No, sir.

Q. You say the lighter came alongside? A. Yes, sir.

Q. What kind of a lighter? A. A float; had a railroad car on a float.

7 Q. What was done? A. We took the stuff in that car on board and put it in the hold of the vessel.

Q. Who did that? A. The crew.

Q. Who told the crew to do that? A. We had orders by the mate to do it.

Q. Where was Captain O'Brien? A. Captain O'Brien I had not seen him; I don't know whether Capt. O'Brien was on board that time; we received the orders from the mate.

Q. You say the crew loaded the stuff out of that car into this vessel? A. Yes, sir.

Q. What was that that you put into the vessel? A. Guns, revolvers, machetes, ammunitions, dynamo, dynamite, provisions.

Q. What kind of guns? A. Different kinds, carbines and long guns, different kinds.

Q. Any large guns? A. One large gun.

Q. What kind of a gun was that, do you know? A. About this long, from where I put my hand here to the end of the table, (witness indicates).

Q. When did you first see Capt. Riley? A. Here in Jacksonville.

Q. Did he come aboard the vessel? A. I hadn't seen him come aboard; he was on board.

Q. Did you see him aboard the vessel? A. Yes, sir.

Q. Was he on board the vessel before the cargo was loaded or after? A. During the time we loaded the cargo he was on board.

8 Q. He was there during that time? A. Yes, sir.

Q. What was he doing? A. He had been on the bridge, and hurried up the people to finish the cargo—the crew.

Q. You say he hurried you up to finish loading? A. Yes, sir.

Q. Did you see any other person come aboard that vessel while she was lying here at the dock? A. Yes, sir; I seen about eight strangers.

Q. Who were they? A. I don't know.

Q. Did you know any of them? A. I did know Col. Nunez.

Q. He was one of them? A. Yes, sir.

Q. How long before you finished loading the vessel? At what time did you get through. A. We got through about one o'clock.

Q. What did the vessel do; where did she go? A. She went outside, about 2 o'clock, we finished taking arms on board, and our winch didn't work properly, took about two or three o'clock, and we went out of the river and there we remained; went out to the mouth of the river, and we stopped, and the tug-boat "Kate Spencer" came alongside and brought people on board.

Q. Did you go out to sea before the Katie Spencer came up? A. The Kate Spencer followed us from the river to the mouth of it.

Q. How far did you go from the entrance to the river before the Katie Spencer came up to where you were? A. I don't know; about three or four miles.

Q. You say the Katie Spencer, the tug, came up to you? A. Yes, she came up to us, but she was afraid to come alongside; she remained about four or five boat lengths off from us, and we had to send out our own boat and take the people from the Kate Spencer on board.

Q. You sent a boat from the vessel to the Katie Spencer? A. Yes, sir.

Q. Who went in that boat? A. Our boat's crew.

Q. Were you among the number? A. Yes, sir.

Q. You saw them go to the Katie Spencer? A. Yes, sir.

Q. What did they bring back? A. Men.

Q. How many men did they bring? A. About one hundred and ten or twenty; I don't know exactly.

Q. About 110 or 120? A. Yes, sir.

Q. Of what nationality were those men? A. They said they were Cubans.

Q. Did you hear any of them say they were Cubans? A. Yes, sir.

Q. What language did they speak? A. Spanish; some could speak English.

Q. They came aboard the Bermuda? A. Yes, sir.

Q. What did the Bermuda do? A. She went out to sea at once.

Q. You testified a while ago that these were arms and ammunition, &c. I will ask you how you knew they were arms?
10 A. I know they broke open some boxes; could see what was in the boxes.

Q. When did they open the boxes? A. During the time going down from Jacksonville to Cuba.

Q. After they got to sea? A. Yes, sir.

Q. Were those 110 or 20 men on board after the boxes were opened? A. Yes, sir.

Q. What did they do with the guns, ammunition, &c., after they were opened? A. They armed themselves with guns and machetes, some with revolvers; there wasn't enough revolvers for all of them, distributed as far as they lasted; I don't know how many.

Q. They were distributed to these men, these Cubans? A. Yes, sir.

Q. Do you recognize any persons in the court-room that was on that vessel? (Witness points to a gentleman.) A. Only that one.

Q. Do you know what that gentleman's name is? A. No, sir; he has never told me.

Q. After you left Jacksonville with the men, arms and ammunition on board, where did the vessel go? A. Go to Cuba.

Q. Went to Cuba? A. Yes, sir.

Q. At what time did you reach Cuba? A. About nine days after; we left on a Sunday, and Monday morning next we reached—eight days after, Tuesday.

11 Q. I want to ask you first; you say Captain O'Brien came here from Philadelphia in command of the vessel? A. Yes, sir.

Q. After you left Jacksonville who was in command of the vessel? A. Capt. Riley, the defendant.

Q. Did Capt. O'Brien go with you from Jacksonville on that vessel? A. No, sir; he left the boat at Jacksonville.

Q. When you got to Cuba how near did you go to the shore? A. About four miles.

Q. Did you reach that point in the day time or night time? A. Night time.

Q. About what time of night? A. Reached the coast ten o'clock.

Q. Did you anchor there? A. No, sir; never did anchor.

Q. When you went in to that point, I want to ask you if the lights of the ship were burning? A. No, sir; they were not burning.

Q. Did she carry any lights at all? A. Only light was burning was in the binnacle; we had orders to never burn any lamps, and never burned any that night—only the binnacle light burning; it was blinded and only a hole to see the compass.

Q. You say that light was blinded, and simply a small hole A. Yes, sir.

Q. In addition to these guns, ammunition, you took on at Jacksonville, you stated you took three boats additional to the vessel's boats from Philadelphia? A. Yes, sir.

12 Q. Did you take any from Jacksonville? A. Six from Jacksonville.

Q. Six additional boats? A. Yes, sir.

Q. Then you state the vessel had nine extra boats? A. Yes, sir.

Q. When she left Jacksonville. A. Yes, sir.

Q. What kind of boats were they? A. Some of them, two or three were navy boats, some surf boats, some large size, larger than our life-boats on board.

Q. About what size were your life-boats? A. Across this room, from that clock on the wall to the east wall of this room.

Q. You reached then within about four miles of the Cuban shore; what was done then? A. We commenced lowering the boats and lowering the material we had on board.

Q. Before you reached there had you done anything with those boats? A. Yes, sir; before reaching there the Sunday we put the boats in davits ready for lowering down, took them out of the hold and put in the davits ready for lowering down.

Q. Did you put anything in the boats? A. No, not at that time, but before we reached the coast of Cuba we put in the large boat the gun and some heavy dynamite and things.

Q. You say you had them on davits ready to be lowered? A. Yes, sir.

Q. What did you do? A. We lowered them down and loaded them; everything was finished, we only wanted people to go in, but no one to lead them in; took very long time to get in.

13 Q. No one to lead them? A. No, sir; I suppose they wanted some one to push them ahead; there was no one to do it.

Q. Was there any officer aboard that vessel, Cuban officer or any person who seemed to——

A. Yes, sir; a soldier; I heard he was a brigadier general, but I don't know his name; six or eight gentlemen I think have been officers; two of them I know; one was called colonel.

Q. Did either of these get in the boats? A. No, sir; they had been drinking beer and getting drunk.

Q. They did not get in the boats? A. No, sir.

Q. Did they all get into these boats and get out? A. No; no one would like to go in except the men at the oars, and they had to take to the oars and stay alongside till they came, but they would not go, and they had to wait a long time.

Q. What happened then? A. Lights showed up and every one thought it was a Spanish man-of-war, and the captain gave orders to go ahead and they tried to get away from there, and while doing that some of the boats capsized, some of them, the lines broke and people got drowned, and there was very much confusion.

Q. You say a light showed up and that all thought it was a Spanish man-of-war? A. Yes, sir.

Q. How do you know they thought it was a Spanish man-of-war? A. They were crying, shouting, said the Spanish—I forget the Spanish word; they said something in Spanish; I knew at that time, but I can't repeat it.

Q. You say there was considerable confusion? A. Yes,
14 sir; very much more than there ought to be.

Q. What did the Bermuda do? A. Headed for the sea; turned around and went out to sea.

Q. Had any of these men landed at that time? A. Yes, sir; one boat I know for sure—the first boat with the gun in, the big gun, had time to reach the shore, but if they did so, I don't know; I heard crying from water; I suppose they had seen the light and wanted to give us notice.

Q. Were any Cubans in the boat that went ashore with the big gun? A. Yes, sir.

Q. About how many men were in that boat? A. I couldn't tell; about six.

Q. You say the Bermuda then went to sea; what else did she do then after she went to sea? A. After the ropes broke and everything was clear of the ship's side, put on all the speed she had, and next day——

Q. Are you speaking of the first time? How many lights did the Bermuda see that night? A. I only seen one, but other people have seen two.

Q. How many efforts did she make to land there that night? A. Only one to land.

Q. How many times did she run from a man-of-war that night? A. Twice; about 10 o'clock we caught sight of the coast, and then a light showed up and thought it was a man-of-war, and turned around to sea again, before we had lowered any boats.

Q. When you went to sea what did you do, the first time?
15 A. The first time we went out to sea and remained there for about two hours, and came back and lowered the boats.

Q. That is when these occurrences took place that you have just been telling about? A. Yes, sir.

Q. How many men were in those boats when you say the ropes were broken or cut? A. About half of them.

Q. Were there any arms in these boats lowered with the men? A. Yes, sir; most fully loaded, only had a little stuff remaining on board.

Q. You ran away from a Spanish man-of-war, or what you took to be the Spanish man-of-war, the last time? A. Yes, sir.

Q. How did you get those boats loose? A. Couldn't, because the people were in our road, and orders were given to cut the lines, but couldn't do it in time; it took too long; only two, I believe, had been cut loose the time the orders were given, and one was going to cut the rope, but the Cubans would not have it; so the line broke and some of the boats capsized.

Q. You saw some of the boats capsize? A. Yes, sir.

Q. Did the Bermuda go and leave those people? A. Yes, sir.

Q. How many of the 110 or 20 that came on board at Jacksonville remained on board after you left? A. About sixty.

Q. How many arms and ammunition remained on board after you left? A. Not much; I don't remember; it was a little.

Q. Where did the vessel go from there? A. To British Honduras.

16 Q. What became of the arms and ammunition she took away from the coast of Cuba? A. Thrown overboard by the Cubans orders.

Q. Where was Capt. Riley? A. On the bridge and around the deck.

Q. He was still in command of the vessel? A. Yes, sir.

Q. Was Capt. Riley in command of that vessel from the time she left Jacksonville until she went to Cuba and came to British Honduras? A. Yes, sir.

Q. When these 110 or 120 men came aboard out here from the Katie Spencer, did they leave any others on the Katie Spencer? A. Yes, sir; about two or three, three or four; I don't know how many; very few.

Q. After they got aboard the Bermuda and she started to leave, did you hear any remarks pass between those on board the Kate Spencer and those that got on the Bermuda? A. Shouting in Spanish; those people on board sung out "Viva Cuba liber," or something like that; so did the people on board her.

Q. You got to British Honduras after having thrown the arms and ammunition overboard; were these 60 men still on board when you got to British Honduras? A. Yes, sir.

Q. When you left there where did you go? A. When we left British Honduras we went to Philadelphia.

Q. Direct? A. Yes, sir.

17 Q. Did you carry these men to Philadelphia? A. No, sir; we go to three different ports; went to one Porto Cortez, and go to another port and leave the men there, and go back to Porto Cortez.

Q. Leave any of the men there? A. No, sir; men put on shore before we reached Porto Cortez.

Q. When you got to Philadelphia none of these men were on board? A. Not one of them.

Cross-examination by Mr. BARRS:

Q. Do you speak Spanish? A. No, sir.

Q. Do you understand Spanish? A. No, sir.

A. You say that Captain O'Brien came here in charge of the Bermuda and remained in charge until he went across the bar with you, and came back on the Kate Spencer? A. Yes, sir.

Q. Turned over the ship to Capt. Riley out at sea? A. Yes, sir.

Q. Are you a navigator? Do you understand navigating ships? Could you take charge of a ship and navigate? A. No, sir.

Q. You are just a sailor? A. Yes, sir.

Q. You say you were nine days going from here to Cuba, from the time you left Jacksonville until you got to the coast of Cuba? A. Yes, sir.

Q. How far is it from here to Cuba? A. I don't know how many miles: have been making it in about four days or four and a half.

Q. How fast is the Bermuda? A. She can go 13 knots.

18 Q. Do you know what part of Cuba you were at? A. No, sir.

Q. Do you know whether east or west? A. No, sir.

Q. The boat was going then—about what was your average speed during the 9 days you were running? A. About eleven knots or eleven and a half.

Q. You were running then about 11 or $11\frac{1}{2}$ knots for nine days? A. Yes, sir.

Q. What direction did you take when you left the St. John's bar; do you know? A. No, sir, I don't know any of the courses.

Q. Do you know where the island of Nevassa is? A. No, sir.

Q. It is an American island down in the Carribean Sea? A. No, sir.

Q. Have you ever been in Jamaica? A. Yes, sir.

Q. About how long would it take the Bermuda to go from here to Jamaica, going about 11 or $11\frac{1}{2}$ knots? She could go there in less than nine days, couldn't she? A. She could go there in six days.

Q. Your only reason for supposing you went to Cuba is because there were men you took to be Cubans aboard, and because they said they were going to Cuba? A. We had a chart, and every day we used to know about where she was going, and others who knew the coast came from the wheel to put it down just where she was at the present time.

By the COMMISSIONER. Q. When you say "we" whom do you mean? Did you put it down? A. No, I didn't.

Mr. BARRS. You didn't put it down at all? A. No, sir.

19 Q. If you watched that chart as you went from day to day, how is it you cannot tell what direction you went to Cuba or what part of it? A. I didn't know the way they put it down; they say, this way is the closest, now this way the closest, and showed it to Cuba.

Q. Showed it to you? A. Yes, sir.

Q. Where were those charts kept? A. A big atlas.

Q. It was not a chart? A. No, a big atlas.

Q. Did Captain Riley ever show you where they were going? A. No, sir.

Q. Who do you mean? A. Some of the crew.

Q. Were they navigators? A. Some of them was; one of them was.

Q. Did he keep an account of the direction you were going every day? A. Not every day; never kept a log; but he put it down the way I tell you.

Q. Did he show you every day as you went along, so that you kept an account in your mind just where you were going? A. I didn't

try in any way to keep an account; only by accident he showed it to me, and I looked at it.

Q. How many times did he show it to you? A. Every day or every two days.

Q. How do you account for being nine days going there when you say you could go there in about three days? We didn't go right along; went around Jamaica.

Q. Went around Jamaica? A. No; north part of Jamaica; here in Jacksonville, here's going to Key West, and from there to Havana; went around some islands here, (Indicating on table.)

Q. What island? A. I have no chart here and couldn't tell, but I can point out.

Q. You were nine days going to Cuba? A. Yes, sir.

Q. Do you know that was Cuba you were running to, or could not it have been Navassa or Jamaica outside of what somebody or some of the men of the crew said? A. I have no proof for it.

Q. You cannot prove it? A. No.

Q. Your impression then is just what you got from some of the men on board of the boat? A. And every one said they would go to Cuba; and if I go anywhere and I leave the boat, it will be the place where I am going to.

Q. Did Capt. Riley tell you he was going to Cuba? A. No, sir; I never spoke to Captain Riley hardly.

Q. Did any pilot; were there any pilots on board? A. No, sir.

Q. Who directed the course of the ship? A. The captain.

Q. Capt. Riley was the only man that directed the course of the ship? A. Yes, sir.

Q. And he never told you you were going to Cuba? A. No, sir.

Q. And the only knowledge you have of the 9 days' trip going to Cuba is, that somebody, a member of the crew, had an atlas and pointed out to you where he said they were going? A. Yes, 21 sir; beside that every one said we were going to Cuba, and when we reached there they said, "That's Cuba," and got down in the boats to go to Cuba.

Q. Do you mean to say there were 120 told you that? A. Not every one; about eight of them.

Q. Eight out of one hundred and twenty? A. 8 or 10,

Q. Eight or ten of them said you were going to Cuba? A. Yes, sir, when we got in sight they said, "That's Cuba; that's Cuba."

Q. If all these eight men had said you were going to Africa would you have believed you were in Africa? A. If they told me that; but when I fully understand that we were going to Cuba, and the captain has got orders to go to Cuba, as I believed——

Q. You fully understood before you left Jacksonville that you had orders to go to Cuba? A. No sir, I wasn't told so.

Q. What makes you think the captain had orders to go to Cuba—just because these eight men told you so; did Capt. Riley ever tell

you he had orders to go to Cuba? A. No, sir; Captain Riley never told me anything.

Q. Who? Just name the eight men? A. None of them here.

Q. Just tell who they were? A. The people on board there; I don't know their names.

Q. Tell you in Spanish? A. No, in English; a good many of them could speak English.

Q. The only reason you have for believing you went to
22 Cuba and that that was the island of Cuba you were within four miles of, is because eight men told you they were going to Cuba, and one of the crew pointed out to you on an atlas where you were going and said "here's where we are," and the fact that they said there was a Spanish man-of-war out there and they got excited? A. Except I have been on that trip before, and the Bermuda would never have taken a cargo of ammunition to Jamaica or anywhere else but to Cuba; they had Cuban flags on board, and Cubans would not take arms to Jamaica to fight for their country.

Q. That is one of your important reasons? A. Yes, sir.

Q. Because you think the Cubans would not go to Jamaica? A. Certainly not.

Q. Where was that Cuban flag you speak about? just some little flag somebody had with him? A. Little flags.

Q. Like this? (pointing to button on lapel of coat.) A. No, about this size, (witness indicates on his hand); flags on front of the coat and in their hats.

Q. How do you know that was a Cuban flag? A. They told me so.

Q. Who? A. Cubans.

Q. These eight men? A. I asked them myself for a flag, and they said they only had the one; one of them had a lot of them and had given them to the others before they reached the shore, so that every one could put in their cap.

Q. When you saw several with one of those Cuban flags
23 on, you thought they were going to Cuba to fight? A. I was told so.

Q. Then your only reason for thinking they were going to Cuba instead of going to some other place is the fact that you thought they were Cubans, that you saw they had what you took to be Cuban flags, and eight of them told you they were going to Cuba—that is your only reason? A. That's all I can mention; I can't positively prove it. I never intended to say anything about it.

Q. How did you come to say something about it? A. Because I didn't get my pay I earned; that is the only reason.

Q. You testified to this because they did not pay you some money that you think somebody owes you? A. What they owe me.

Q. That is the only reason you told this? A. Yes, sir.

Q. Then in reality you are not collecting your money in this way? A. No, sir.

Q. You don't get it in that way? A. No, sir; because the owner—I shipped for so much and so much money and overtime; I have been working overtime and didn't get it.

Q. Who was that, Mr. Hart? A. The owner, Mr. Hart.

Q. How much did he owe you? A. About \$2.15; I say if Mr. Hart had paid me this \$2.15, I would never have opened my mouth.

Q. Because Mr. Hart did not pay you \$2.15—wouldn't pay you \$2.15 he owed you—you made affidavit against Capt. Riley and want to send him to the penitentiary? (Question objected to.) A. I have no grievance against Capt. Riley.

Q. When were you summoned to appear here at Jacksonville? A. Day before yesterday.

Q. In Philadelphia? A. Yes, sir.

Q. Did you know you were going to be summoned before you were summoned? A. Yes, sir.

Q. Who had told you? A. Pinkerton's Detective Agency; one of Pinkerton's detectives told me so.

Q. Did he ask you to come down? A. Yes, sir.

Q. Did he come down with you? A. Yes, sir.

Q. Who paid your way down, the Pinkerton detective? A. I didn't pay it myself; I don't know who paid it.

Question objected to by the prosecution, as the law settles the question—the Government pays it.

By the COMMISSIONER. That is immaterial.

MR. BARRS:

Q. Have you been promised any consideration for testifying other than your regular fees? A. No, sir; nothing. I did not do it for that; they were going to cheat me for risking my life; I wouldn't be willing to do it.

Q. Who were the three passengers that came on board the Bermuda from Philadelphia here? A. One I took to be a Cuban, but I don't know his name or anything of him, but two of them were Americans; I don't know their names either; they spoke perfect English.

Q. Do you know whether these men were really part of the crew, or whether they were passengers? A. They had not signed.

Q. They were not signed? A. No, sir; they didn't sign with us, whether they have signed or not I don't know; they never done any work.

Redirect examination by Mr. CLARK:

Q. Had you sailed around the coast of Cuba previous to that time? A. Yes, sir.

Q. About how many times? A. I have been around that coast about a dozen times.

Q. This Spanish man-of-war—how near did that vessel get to the Bermuda? A. About two or three miles.

Q. When the Bermuda went to sea did the man-of-war follow her? A. Yes, sir.

Q. Did the man-of-war have a search light? A. Yes, sir.

Q. Was that flashed on the Bermuda? A. Yes, sir.

Q. How far did she follow her to sea? A. Till next morning about five o'clock; I am not positive—people say she followed after that, but I didn't see it.

Q. You did not see her after 5 o'clock? A. No, sir.

Q. How long did it take you to reach British Honduras? A. About six days or a week, reached there on Sunday, left there Tuesday—no, we were only five days.

By the COMMISSIONER: When was it you say you got off the coast of Cuba? At night? A. Yes, sir; dark night, it was
26 a dark night, cloudy; we had a light back-ground, but the man-of-war had a cloudy back-ground, very dark; the moon was clouded.

Q. How do you know that was the coast of Cuba? A. The way I explained; I have no positive proof of it.

By Mr. CLARK:

Q. Did you hear any of these men, when you reached that point, make any statement about what place they had reached? A. No, sir; in fact, I had been sleeping; I had slept till we reached the island, and then I had to work.

Q. Then you had to get up and work? A. Yes, sir.

Q. Was there anything said about what they were going to do? A. Yes, sir; load on the boats and hurry up and get away from there.

Q. Where were they going with the boats? A. Load the boats down, and take the stuff on shore and get away.

Q. Ashore where; what shore? A. On Cuba.

Q. Did any of them say that; did any of them say it was Cuba? A. I can't swear to it.

Q. They said on the way, though, that they were going to Cuba? A. Yes, sir; not only once, but several times.

Re-cross examination:

Q. Eight of them said so? A. Yes, sir; at least eight.
27 PAUL MAIWALT, a witness in behalf of the Government, being a German and unable to speak the English language, Jacob Burkheim is duly sworn as interpreter.

PAUL MAIWALT, being duly sworn, deposes and says:

By Mr. CLARK:

Q. Where do you live? A. Philadelphia.

Q. What is your business? A. Sailor.

Q. How long have you been in this country? A. Since April of this year.

Q. Did you ever ship as a sailor aboard the steamship Bermuda?
A. Yes, sir.

Q. Where was the Bermuda when you went aboard of her?

A. The Bermuda was on Vine street, in Philadelphia, when I went aboard of her.

Q. Did you ship as a common sailor? A. Only shipped as a common sailor.

Q. When did you go aboard the Bermuda at Philadelphia?

A. About three o'clock in the afternoon.

Q. What month and year? A. In April, 1896.

Q. Did you leave Philadelphia on board the Bermuda when she left there? A. The boat was lying in the stream, and they took coal aboard and 7 o'clock that evening they left.

Q. Did you have any other cargo except the coal? A. They had no other cargo with the exception of three boats they received

28 Q. What kind of boats were they? A. They were large boats.

Q. Were they additional to the ship's boats? A. They had four others, and those they had were three extras.

Q. Where did the Bermuda go from Philadelphia? A. To Jacksonville, Florida.

Q. Here where you now are? A. Yes, sir.

Q. Did the Bermuda stop on the way to Jacksonville at any place? A. No, sir.

Q. Were there any persons aboard the Bermuda from Philadelphia to Jacksonville other than the ship's crew? A. Besides the crew and all others, there wasn't but one man aboard that could speak Spanish.

Q. Did you know who that man was? A. If I can see him I can recognize him, but don't know his name.

Q. When the vessel got to Jacksonville did she come right up to the city, or did she stop outside the entrance to the river? A. Stopped about two hours before they entered the river.

Q. Did any persons come aboard the vessel while she stopped out there? A. A pilot.

Q. After she left the entrance to the river, where did she go? A. Then they came direct to the city.

Q. What time of day or night was it that she came up to the city? A. About eight o'clock, I think, at night.

Q. Did any persons come aboard of her after she came up
29 to the dock? A. When we anchored here in the river some of them came aboard, and they had a lighter; some of them came with a small rowboat.

Q. What did they do? A. They came aboard and they talked between themselves, but I didn't notice them.

Q. What did they do with the lighter? A. When the lighter came close to the ship she had some cargo on her, and we took it off and put it into the ship.

Q. What was that cargo? A. I don't know anything that was

in the boxes, but when I was down in the hold one of the boxes came down and broke and there were arms in it.

Q. What did the Bermuda do after this cargo was loaded on her?

A. After we had all the cargo in we put aboard her six surf boats.

Q. Then what did you do? A. After we had the boats aboard we lifted the anchor and went down the river and anchored again there.

Q. What was done there? A. After four o'clock we raised the anchor again and went out to sea.

Q. Did you stop any place when you got off the shore, out at sea? A. When we went out to sea we stopped there about 3 or 4 hours.

Q. Tell all that was done when you stopped there? A. While we were lying out there a tug boat came to us and they had 120 men aboard, but she didn't go to the Bermuda, but we sent our own boat and took those men on the Bermuda.

Q. Who was in command of the Bermuda; who was
30 captain of the Bermuda at that time? A. First, Capt.

O'Brien was aboard, and he came as far as the tug boat, and when we got through he came back on the tug boat to Jacksonville.

Q. Who had command of the Bermuda after Capt. O'Brien left?

A. There was another captain came here on board to Jacksonville.

Q. What was his name? A. Captain Riley.

Q. Do you see Capt. Riley in the court-room? A. Yes, sir.

(Witness points to defendant.)

Q. Did Capt. Riley remain in command of the Bermuda after she left out here? A. He took the command at the time the tug left us.

Q. Did the 120 men that came aboard from the tug after they got to sea do anything with the cargo—the boxes? A. After they had been out for three days they went down to the hold and opened the boxes and every man was armed with some of the arms.

Q. What did you do with the arms after you received them? A. We didn't do any drill or anything, but merely took them and let the men have them.

Q. Do you know of what nationality those 120 men were that came aboard? A. The most of them spoke Spanish, but there were some that spoke English, but they told me they were all Spanish.

Q. Did you know where you were going on the Bermuda when she left Jacksonville? A. When we left here I didn't know that
31 we were going to Cuba, but they were all talking about going to Cuba.

Q. Whom do you mean by "they" said they were all going to Cuba? A. I heard some of the Cubans, but there were two American people aboard and they told me they were going to Cuba.

Q. Did they say what they were going there for? A. Some of them told me they were going down to fight in Cuba.

Q. After the vessel left the outside, after these men had been put

aboard, where did the vessel go? A. That is where I thought we were going; it took ten days to go from here before we saw land, and when we saw the land we supposed that was Cuba.

Q. Did you make any landing, or attempt to make any, to land the cargo or men? A. We were steering for the land when we saw a light, and when we saw the light we turned off again and went out to sea, and when we couldn't see the light any more we come back again.

Q. Where did that light come from? A. We thought it was a man-of-war; the light was on her; it was a man-of-war.

Q. What kind of a man-of-war? A. I don't know.

Q. Did you see the vessel? A. Didn't see the ship, but just saw the light.

Q. What kind of a light was it? electric flash light? A. It was a bright red.

Q. Do you know what a search light is that those vessels carry?

A. I know it was not a reflecting light, or anything like that.

32 Q. The ship went out and came back; what took place after the ship came back? A. When we came back again we lowered eight boats and filled them with the ammunition and guns and everything, and the ninth boat was still hanging on the davits.

Q. Tell all that was done there? A. After the boats were lowered; and had everything in there, there was a man right next to me says he saw a light, and that was reported to the captain, who was then on the bridge of the Bermuda; he gave orders to cut all the ropes and let the boats go, and she went off.

Q. Was that done? Did you cut the ropes? A. There were two or three that were cut, the ropes, but the others were not; some of them were smashed up.

Q. Were there any men in the boats? A. About 40 people.

Q. Were they some of the men that were taken from off the tug here at Jacksonville? A. Yes, some of the same men.

Q. State what the Bermuda did then? A. She left entirely that part and went to British Honduras.

Q. Did she still have any of those 120 men on board, and did she still have any arms or ammunition on board when she left for British Honduras? A. The balance of those 40 men—I didn't count them exactly—were still aboard, and the balance of the cargo we had thrown overboard at sea before we came to Honduras.

Q. Did those men leave the vessel at any time, and where did they leave it? A. They went to a small place in Hon-
33 duras; I don't know the name of the little place, and there we left all the men there.

Q. Where did the Bermuda go when she left that place? A. For Porto Cortez.

Q. Where did she go from there? A. We went on the coast and got some bananas, and from there we went in to Cortez, and from there we sailed to Philadelphia.

Q. When you saw this last light; the night these boats had been lowered and men were in them, you say you discovered a light; where was that light from? A. I think it was a light from a ship, a man-of-war.

Q. Did I understand you to say that a man standing by you saw the light and said it was a Spanish man-of-war? A. A man told me there was a light, but he couldn't tell where the light was from, whether a ship or anything else.

Q. What did you say about reporting it to the captain and the captain ordering the lines to be cut? A. I can't tell about how the captain got the report, because everything was so excited, didn't know one thing from another at the time.

Q. Who gave the orders to cut the lines? A. The command came from the bridge.

Q. Who was there? A. The whole bridge was full, but the captain is generally there, and first officers, plenty of them there.

Q. Did Capt. Riley have command of the ship at that time? A. Yes, sir; Capt. Riley.

Q. At what rate of speed did the Bermuda leave that place? A. They said she made 14 miles.

Q. Were the Bermuda's lights out when she went in or were they lighted? A. There were no lights burning; the only light that was burning was that at the compass, and that was fixed so that it could not be seen.

Q. Do you know the speed of the Bermuda, the number of miles she can make? A. I think about 10 or 11 miles.

Q. Did the Bermuda on that trip make any attempt to land those men or that cargo at any other place except that place, that night you testify about? A. I don't know; I don't think we tried to make any attempt to stop at any other place.

Cross-examination :

Q. About what time of day was it, in the morning, that Capt. O'Brien left the ship at sea off the bar here? A. Between 11 and 12 o'clock.

Q. Between 11 and 12 a'clock in the day? A. Yes, sir.

Q. About 11 or 12 o'clock in the day when Capt. O'Brien turned the ship over to Captain Riley? A. Captain Riley came aboard the ship when they left Jacksonville, and from Jacksonville down the river the pilot had charge of the ship.

Q. How far at sea were you when Capt. Riley took charge? A. About 3 or four miles at sea.

Q. Who was it told you you were going to Cuba? A. I heard it from the passengers that came aboard that ship.

Q. Do you understand Spanish? A. No.

Q. Did Capt. Riley ever tell you you were going to Cuba?

A. No, sir.

Q. Did any of the officers of the ship? A. None of the first officers, but the second officer told me we were going to Cuba.

Q. The second mate told you? A. The second mate.

Q. How many of the 120 men can you swear positively told you that you were going to Cuba? A. About four of them.

Q. Are you a navigator and understand navigation? A. I am no navigator.

Q. Do you know how long it would take ordinarily to go to Cuba? A. It would depend upon what place; if they have to go to Havana it would take them about 4 days.

Q. Were you ever along the coast of Cuba so that you know it well enough to recognize it when you see it? A. I was with a German man-of-war.

Q. What part of Cuba were you at? A. Havana and Santiago de Cuba.

Q. How close were you to the land at the time you started to land on the Bermuda? A. One and a half miles.

Q. Was it a dark night? A. Yes, sir.

Q. Do you know the island of Navassa and where it is? A. No.

Q. Do you know just where Jamaica is? A. Yes, sir.

Q. Did you keep any account of the route the Bermuda took from here when she went on that trip for the ten days? A. We were going according to the tide, but we steered about east.

36 Q. How far did you go east? A. Two days.

Q. Did you change your course then, and what direction did you go? A. Then we steered southeast.

Q. How long did you go in that direction? A. I don't know.

Q. Do you know when they changed the direction again, if they changed it at all? A. I don't think I know; I only stood on every eight hours, and couldn't tell the direction we went.

Q. What reasons have you for believing that the land you saw was Cuba? Give the different reasons. A. Of my own knowledge I don't know, but we put off the ammunition there and the men aboard on the ship told me they were going off now.

Q. Then your reason for believing that was the Island of Cuba was, there were four men told you you were going to Cuba, and you were putting off arms and ammunition in boats? A. I can't positively say that was the reason, but I think so.

Q. Was that the reason, because those four men said they were going to stop at Cuba? A. There was a man aboard of her who run a barber shop somewhere, and he was on board the ship, and he told me positively they were going to Cuba, and that is the reason I think it was Cuba.

Q. You don't speak English? A. Very little.

Q. What language did this man talk in that told you they were going to Cuba? A. Two Americans told me, and I understood what they said; and the man that had the barber shop could speak English; he was a Cuban, but I understood that much that was told.

37 Q. Ask him if he can repeat in English what the man told him? A. I couldn't talk it, but I could understand it.

Q. Ask him if he had any conversation with him, or did the man just say he was going to Cuba? A. There was one sailor aboard of the ship was a German and speaks good English, and also told him; he told me about it.

Q. What was that? A. He is from Philadelphia.

Q. Then most of your information as to what these men said comes from the sailor who talks German and English both? A. I could understand some of the others—what they meant; when any man told me “I go to Cuba to fight there” I know what that meant.

Redirect examination by Mr. CLARK:

Q. Ask him if the eight boats that he says were lowered at the place, which he takes to be off the coast of Cuba, were eight of the nine boats that were taken on at Philadelphia and Jacksonville? A. Yes, sir.

Q. Have you ever been to Key West? A. No; I have sailed by there.

Q. Did this vessel stop at Key West on her way down—the Bermuda? A. No, sir.

Q. When these men were put into the boats that had been lowered, did they have any arms in their possession—machetes? A. On the boats there were guns and ammunition.

Q. On the small boats? A. On the boats.

38 Q. Ask him if the men had any big knives or swords in their hands or anything like that? A. Yes, sir.

C. HOPKINS, a witness on behalf of the Government, being duly sworn, deposes and says:

By Mr. CLARK:

Q. What position do you hold under the Government of the United States? A. Special deputy collector of customs, district of New Orleans, located at Jacksonville, port of Jacksonville.

Q. I will ask you if the steamship Bermuda entered and cleared at this port the 27th of April last? A. Yes, sir.

Q. Did she clear in the daytime or at night? A. She cleared in the evening.

Q. What time? A. I cleared this vessel as deputy collector constructively, and during my absence and the absence of the collector, the inspector, Capt. F. C. Sollee, inspector, cleared the vessel, and he can give you more information in regard to this matter than I can.

Q. Have you the record there of the clearance? A. Yes, sir.

Q. Let me see them.

(Witness hands papers to counsel.)

A. In clearing the captain of a foreign vessel takes the clearance papers, no duplicate kept in our office; we keep a duplicate simply as a manifest of passenger list.

39 Q. Is this the passenger list of that vessel from Jacksonville? A. Yes, sir.

Q. I will ask you if any other passengers except these were reported to you as passengers on board that vessel? A. Not to my knowledge; as I have just stated, I cleared that vessel constructively.

Q. What do mean by that? A. I mean this, that the clearance was actually made by the inspector during the absence of the collector and myself.

Q. Did you sign that? A. He is authorized to sign that; that is perfectly regular.

Q. And Edward G. Riley was the master? A. So those papers report.

Q. Did you meet Capt. Riley on that occasion? A. No, sir.

Q. He also made up this manifest? A. No, sir; he signed it, I suppose that was made by Captain Riley or somebody else?

Q. He signed your name with your authority? A. Yes, sir.

Q. What name is this (indicating on another paper)? A. It seems to be "Foster, agent;" this is only the skipper's manifest; they have to produce this first before we issue the other.

The three papers referred to, offered in evidence by the Government, as relevant testimony to make out its case; and same are filed with the Commissioner, and marked exhibits——

Q. Do you know who John Kennedy, the consignor is? A. No; I didn't know the Bermuda was in port, because it was Sunday evening.

40 (Hearing adjourned to 2.30 P. M.)

(Taking of testimony resumed at 2.30 P. M.)

FRANCIS C. SOLLEE, a witness on behalf of the Government, being duly sworn, deposes and says:

By Mr. CLARK:

Q. What position, if any, do you hold under the Government of the United States? A. I am Inspector of Customs.

Q. I will get you to state if you signed that (handing paper to witness)? A. Yes, I signed it in the absence of the deputy.

Q. And this one also (handing witness another paper heretofore introduced in evidence)? A. Yes, sir.

Q. And you also signed that (handing witness the third paper introduced in evidence)? A. Yes, sir.

Q. Do you remember the time when the steamship Bermuda came into this port? A. Yes, sir; very well.

Q. Did she clear from this port? A. Yes, sir.

Q. To what port? A. Cleared to Cortez, British Honduras.

Q. What time of day was it that these papers were prepared? A. About half past 7 in the evening.

Q. Do you know whether the steamship Bermuda changed captains at this place or not? A. There was no British Consul here, when they cleared the vessel, Captain O'Brien and Captain Riley came to the Custom House together, and they said they wanted to change masters; I told them that under the American law
 41 if she was a foreign vessel we had no power to do so in the customs house, that power rested with the British consul to do; they then told me the British consul was not in the city; then I told them it was impossible for me to do anything; then they presented a letter from the owners at Philadelphia, directing Capt. O'Brien to turn over to Capt. Riley the British ship Bermuda; I then, at the request of the captain, made a memorandum on the register in the corner of that fact; the change of masters has to be made upon the document presented by the master on the back of it; there are printed blanks and spaces for that purpose, and every vessel that goes foreign, or under enrollment or under license, there is a space left for change of masters, and it is done; but in foreign vessels there is no power vested in the officers of the customs for doing that; with foreign vessels that rests entirely with the consul or their representative.

Q. Did you meet Capt. Riley at that time? A. Yes, sir.

Q. Do you recognize him in the court room? A. I think that is the gentleman by Mr. Barrs (pointing to defendant); I didn't see him but a very short time, probably an hour.

Q. Did he sign that paper in your presence (indicating paper heretofore introduced in evidence)? A. Yes, sir.

Q. Did he sign that (indicating another paper)? A. Yes.

Q. I will ask you if you know John Kennedy, the consignor mentioned in this manifest? A. I don't think I know him; I don't think I could point him out.

Q. Do you know where he lives; A. I do not; I am told he lives in Jacksonville.

42 Question and answer objected to by defendant's solicitor, unless witness knows what John Kennedy it is shipped to.

Q. When this ship came in here where was she bound as shown by the papers—from what port to what part? A. From Philadelphia for Key West, as I understood it.

Cross-examination:

Q. I believe you said that the Bermuda was a foreign vessel, a British vessel? A. She had a foreign register, British register.

FRANK WILLIAMS, recalled for the Government.

By Mr. CLARK:

Q. I will ask you, when this ship Bermuda left Jacksonville as

you testified, if she landed at Porto Cortes? A. Not before she did go to Cuba.

Q. I mean before she went there? A. No, sir.

Q. Was this cargo discharged at Porto Cortez? A. No, sir.

Q. Did the incident about which you testified—that is, about the attempt to load arms on small boats near that island—did that take place before or after the Berinuda went to Porto Cortez? A. Before.

Government closes.

Defendant offers no testimony.

43 After argument of counsel, the Commissioner rendered his decision as follows:

In order to hold a person under the complaint herein it is necessary to establish by presumptive evidence that he began, set on foot, or provided or prepared the means for a military expedition or enterprise within the Southern District of Florida. From the evidence in this case I do not see that there is probable cause to suspect that the law has been violated by the prisoner, and it is therefore ordered that the prisoner be discharged from custody.

This is to certify that on this seventh day of July, 1896, within the jurisdiction of the United States Circuit Court for the Southern District of Florida, before me, Julius Otto, United States Commissioner in and for said district, personally came Frank Willson, to me well known to be the stenographer who took down the testimony of Frank Williams, Paul Maiwalt, C. Hopkins and F. C. Sollee, the witnesses who gave their testimony at the preliminary hearing of the case against Captain Riley held before me as United States Commissioner on the 3rd day of July, 1896, in the City of Jacksonville, Florida, and who took said testimony down in my presence, and the said Willson under oath did declare that he was present at the said preliminary hearing of the said Riley, and that he did faithfully and accurately reduce the proceedings had and the testimony given before me in said cause to writing, and that the foregoing type-written pages numbered one to forty-three inclusive contain an exact and literal transcript of the proceedings had at said hearing, and of the testimony of the said Frank Williams, Paul Maiwalt, C. Hopkins and F. C. Sollee given at said hearing; and I further certify that I know the signature of the said Frank Willson attached to this affidavit to be that of the said stenographer, who reduced to writing the testimony of the witnesses given at the hearing aforesaid, and that he signed this affidavit in my presence, after having been duly sworn by me.

FRANK WILLSON.

Sworn to and subscribed before me at Jacksonville, Florida, on this 7th day of July, 1896.

[SEAL]

JULIUS OTTO,
*United States Commissioner
for the Southern District of Florida.*

I, Eugene O. Locke, clerk of the Circuit Court of the United States, in and for the Southern District of Florida, do hereby certify that Julius Otto, whose signature appears to the foregoing affidavit as the officer before whom said affidavit was made, is well and personally known to me, and that I know him to be a commissioner of the Circuit Court of the United States, in and for the Southern District of Florida, and to be the commissioner before whom the preliminary hearing in the case of the United States against Capt. Riley, held on the 3rd day of July, 1896, at Jacksonville, Florida, was had; and I hereby further certify that I know his signature, and know that the signature of the said Julius Otto, attached to the foregoing affidavit as that of the officer before whom said affidavit was made, is the true and genuine signature of the said Julius Otto. In witness whereof I have hereunto set my hand and the seal of the Circuit Court of the United States for the Southern District of Florida, at Jacksonville, Florida, on the 7th day of July, 1896.

[SEAL]

E. O. LOCKE,
*Clerk of the Circuit Court of the United States
 for the Southern District of Florida.*

1 Northern District of Florida, Fifth Circuit at Tallahassee.

To the judge of the district court of the United States for the northern district of Florida:

J. Emmet Wolfe, attorney for the United States for the northern district aforesaid, who for the said United States in this behalf prosecutes, exhibits this his libel of information against the hereinafter described property, and against all persons lawfully intervening for their interest therein.

And thereupon, the said attorney for the United States gives the court here to understand and be informed, that on or about the 29th day of August, A. D. 1895, on land within the northern district of Florida, and within the collection district of Cedar Keys, Florida, James L. Cottrell, then collector of United States customs at Cedar Keys, Florida, did, acting as such collector, seize certain property, that is to say:

- 200,000 Winchester cartridges (44 calibre).
- 25,000 U. M. C. cartridges, (brass) "43 spanish."
- 190 Remington carbines.
- 108 swords, or machetes.
- 43 boxes soda biscuits.
- 2 bbls. mess beef.
- 1 " rice.
- 1 P. salt.
- 100 lbs. sugar.
- 75 " ground coffee.

- 2 bushels onions.
- 2 " peas.
- 4 cases corned beef, (canned).
- 1 case tomatoes.
- 2 1 case soap.
- 1 " codfish (pkgs.).
- 10 ovens and lids.
- 4 " spiders."
- 9 frying pans (iron).
- 4 doz. tin plates.
- 2 do. " cups.
- 9 coffee pots.
- 4 axes and handles.
- 1 box containing asst'd nails No. 100 wire, and 4 balls cord.
- 63 knapsacks and haversacks (damaged).
- Valued at, to wit, \$4,812.35.

—which aforesaid property said collector of customs now holds in his possession, within the judicial and collection district aforesaid, as forfeited to the United States for the cause following, to wit :

For that the said property so seized, (the owner or owners of same being to the said United States attorney unknown), consists of certain Remington carbines, metallic cartridges, provisions and other property, which has been and lately was before the time of said seizure, to wit, on or about the day aforesaid, unlawfully provided and prepared by certain person or persons unknown, as means for a certain military expedition, and enterprise to be carried on from the United States of America against the territory and dominion of a certain foreign prince, to wit, the King of Spain, with whom the United States was at the time of the setting on foot of the aforesaid military expedition and enterprise, and still is at peace, contrary to the form of the statute of the United States in such case made and provided. By reason of which premises and by force of the

3 statute aforesaid, the said property became, and is forfeited to the United States.

Whereupon the said United States Attorney, who prosecutes as aforesaid, for the United States, prays that the court may decree and adjudge that said aforescribed property is forfeited to the United States, and that due process of law may be awarded in this behalf to enforce the forfeiture of the said property so seized as aforesaid, and that due notice may be given according to law, to all persons concerned to appear on the return day of such process, and show cause if any they have, why such forfeiture should not be adjudged.

And the said United States Attorney says that all and singular

the foregoing premises are true, and within the admiralty and maritime jurisdiction of the United States.

J. EMMET WOLFE,

U. S. Attorney.

Sworn to and subscribed before me this 4th day of October, 1895:

[SEAL]

JOHN McDOUGALL,

U. S. Clerk.

Endorsement. United States vs. 190 Remington Carbines and sundry articles of merchandise. Libel of information. Filed Oct. 4th, 1895. John McDougall, Clerk. J. Emmet Wolfe, U. S. Attorney.

4 The President of the United States.

To the Marshal of the Northern District of Florida, greeting:

Whereas a libel of information has been filed in the District Court of the United States for the Northern District of Florida, on the 4th day of October, in the year of our Lord one thousand eight hundred and ninety-five, by J. Emmet Wolfe, United States Attorney for the said district, on behalf of the United States, against the following described property, now in the custody of the collector of the United States Customs at Cedar Keys, Florida, to wit:

200,000 Winchester cartridges (44 calibre).

25,000 U. M. C " brass, " 43 Spanish."

190 Remington Carbines.

108 swords, or machetes.

43 boxes soda biscuit.

2 bbls. mess beef.

1 " rice.

1 " P. salt.

100 lbs. sugar.

75 " ground coffee.

2 bushels onions.

2 " peas.

4 cases corned beef (canned).

1 " tomatoes.

1 " soap.

1 " codfish (pkgs.).

10 ovens and lids.

4 " spiders."

9 frying pans (iron).

4 doz. tin plates.

2 doz. tin cups.

5 9 coffee pots.

4 axes & handles.

1 box containing asst'd nails, No. 100 & 4 balls cord.

63 knapsacks & haversacks. (Damaged.)

Valued at to wit: \$4,812.35;

for the reasons and causes in said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons having or pretending to have any right, title, or interest therein may be cited to appear and answer all and singular the matter in the said libel articulately propounded, and that this court would be pleased to pronounce for the forfeiture of the aforementioned property.

You are therefore commanded to attach the said described property, and to detain the same in your custody until the further order of this court respecting the same, and to give notice by publication for ten days previous to the day of trial, of such seizure or libel to all persons claiming the said described property, or knowing or having anything to say why this court should not pronounce against the same, according to the prayer of said libel, and decree that the same be forfeited to the United States; and that they be and appear before the said court to be holden in and for the said Northern District of Florida, at the United State Courthouse, in the city of Tallahassee, in said District, on the last Monday in October next, if that be a day of jurisdiction, and if not, then on the first day of jurisdiction thereafter; at 10 o'clock in the forenoon of that day, and there and then to interpose a claim to the said described property; and to make their allegations in that behalf; and what you shall have done in the premises do you then and there make return, together with this writ.

6 Witness the Honorable Charles Swayne, Judge of said Court and the seal thereof, this the 7th day of October, A. [SEAL] D. 1895, and of the independence of the United States the 120th year.

JOHN McDOUGALL,
Clerk.

Endorsements. In obedience to the within monition and attachment I have attached the 190 Remington Carbines and sundry articles of merchandise, herein described, on the 9th day of October, A. D. 1895, and have given due notice to all persons claiming the same, that this Court will on the 28th day of October, A. D. 1895, if that shall be a day of jurisdiction: if not on the next day of jurisdiction thereafter; proceed to the trial and condemnation thereof, should no claim be interposed for the same. Saml Puleston, U. S. Marshal. Northern Dist. of Fla. Cedar Keys, Florida, Oct. 9th, 1895. U. S. District Court, Northern District of Florida. In Admiralty. United States vs. 190 Remington Carbines and sundry articles of merchandise. Monition and Attachment. Issued October 7th, 1895. Returned and filed October 12th, 1895. John McDougall, clerk.

7 In the District Court of the United States of America for
the Northern District of Florida.

THE UNITED STATES, ETC.	} Libel of Information.
vs.	
190 REMINGTON CARBINES ET AL.	

Please enter our appearance as the Proctors and Attorneys for Philip Burns and F. M. Hester, the claimants of portions of the property described in the information in this behalf.

T. M. SHACKLEFORD,
N. B. K. PETTINGILL,
Proctors and Attorneys for Claimant.

Dated Oct. 25th, 1895.

To JOHN McDUGALL, Esq.,
Clerk, etc.

Endorsements. In U. S. District Ct. Northern Dist. of Fla.
United States vs. 190 Remington Carbines et al. Appearance for
Claimants. Filed Oct. 25th, 1895. John McDougall, Clerk.

In the District Court of the United States of America for the North-
ern District of Florida.

THE UNITED STATES OF AMERICA, ETC.	} Libel of Information.
vs.	
8 190 REMINGTON CARBINES AND SUN- DRY ARTICLES OF MERCHANDISE.	

And now F. M. Hester, intervening for the interest of himself in the 43 boxes soda biscuit, 2 bbls. mess beef, 1 bbl. rice, 1 bbl. P. salt, 100 lbs. sugar, 75 lbs. ground coffee, 2 bushels onions, 2 bushels peas, 4 cases corned beef (canned), 1 case tomatoes (canned), 1 case soap, 1 case codfish (pkgs.), 10 ovens and lids, 4 spiders, 9 frying pans (iron), 4 doz. tin plates, 2 doz. tin cups, 9 coffee pots, 4 axes and handles, 1 box containing asst'd nails, No. 100 wire, and 4 balls cord in the libel of information in this behalf mentioned, appears before the honorable court and makes claim to the said 43 boxes soda biscuit, and other articles of personal property, hereinbefore described, as the same are attached by the marshal under the process of this court at the instance of the United States of America; and the said F. M. Hester avers that he was in possession of the 43 boxes soda biscuit, and other articles of personal property aforesaid, at the time of the seizure thereof, and that he was and is the true bona fide owner of the same, and that no other person is the owner thereof: Wherefore he prays leave to defend accordingly.

F. M. HESTER,
For His Own Interest.

STATE OF FLORIDA,
Duval County:

F. M. Hester being duly sworn deposes and says, that he resides in the county of Levy, State of Florida, within the Northern District of Florida, and that said claim is true as set forth above.

F. M. HESTER.

Sworn to and subscribed before this 18th day of October, A. D. 1895.

[SEAL]

D. EAGAN,
United States Commissioner.

Endorsements. In U. S. District Court for the Northern District of Florida. United States *vs.* 190 Remington Carbines et al. Claim of F. M. Hester. Filed October 25th, 1895. John McDougall, Clerk. T. M. Shackelford, N. B. K. Pettingill, Proctors for Claimant.

9 In the District Court of the United States of America, for the Northern District of Florida.

THE UNITED STATES OF AMERICA, ETC.,	} Libel of Information.
<i>vs.</i>	
190 REMINGTON CARBINES AND SUNDRY	
ARTICLES OF MERCHANDISE.	

And now Philip Burns, intervening for the interest of himself, and as agent for the interest of Henry L. Knight, Perry G. Wall, Jr., C. L. Knight, and J. Edgar Wall, as co-partners under the firm name of Knight & Wall, in the one hundred and ninety Remington carbines, one hundred and eight swords or machetes, two hundred thousand Winchester cartridges (44 calibre), twenty-five thousand U. M. C. cartridges (brass) "43 Spanish," and sixty-three knapsacks and haversacks (damaged) in the information in this behalf mentioned, appears before the honorable court and makes claim to the said arms, ammunition and personal property hereinbefore described, as the same attached by the marshal under the process of this court at the instance of the United States of America.

And the said Philip Burns avers that he was in possession of the arms, ammunition and personal property aforesaid at the time of the seizure thereof and had a special property in and claim upon the same for certain storage and other charges due to him from the owners thereof, and that the said firm of Knight & Wall, composed of the persons aforesaid, is the true and bona fide owner of the same and that no other person is the owner thereof; and the said

Philip Burns is the true and lawful bailee thereof as agent, wherefore he prays leave to defend accordingly.

10

PHILIP BURNS,

For his own interest and as agent
for Knight & Wall.

T. M. SHACKLEFORD,

N. B. K. PETTINGILL,

Proctors for Claimant.

STATE OF FLORIDA,

Duval County :

Philip Burns being duly sworn deposes and says that he resides in the County of Levy, State of Florida, within the said Northern District of Florida; that the firm of Knight & Wall, above named, all reside and have their place of business beyond the limits of said Northern District; that this deponent is duly authorized to interpose this claim in behalf of said Knight & Wall; and that the said claim is true as set forth above.

PHILIP BURNS.

Sworn to and subscribed before me this 18th day of October, 1895.

[SEAL]

DENNIS EAGAN.

United States Commissioner.

Endorsements: In U. S. District Court for Northern District of Florida. United States vs. 190 Remington Carbines et al. Claim of Philip Burns. Filed Oct. 25th, 1895. John McDougall, Clerk.

T. M. Shackelford, N. B. K. Pettingill, Proctors for Claimant.

11

In the District Court of the United States of America, for
the Northern District of Florida.

THE UNITED STATES OF AMERICA, &C.,

*vs.*190 REMINGTON CARBINES AND SUNDRY
ARTICLES OF MERCHANDISE.

} Libel of Information.

Know all men by these presents, that we, F. M. Hester, as principal, of the County of Levy and State of Florida, and Philip Burns and C. B. Barnard as sureties, of the County of Levy, in the State of Florida, are held and firmly bound unto the United States of America, in the sum of two hundred and fifty dollars, to be paid to the said United States: for the payment of which well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 18th day of October, A. D. 1895.

Whereas a libel of information was filed in the District Court of the said United States for the Northern District of Florida on the fourth day of October, A. D. 1895, by J. Ammet Wolfe, attorney of the said United States for the District aforesaid, on behalf of the

said United States, against certain property, for reasons and causes in the said libel of information mentioned, and praying that the same be condemned as forfeited; which property is set forth and described in the said libel of information in the case entitled: The United States of America vs. 190 Remington Carbines and Sundry Articles of Merchandise;

12 And whereas a claim has been filed in the said court by the said F. M. Hester for his own interest, as owner of a part of said property, which said part is fully described in the said claim so filed as aforesaid;

Now, therefore, the condition of this obligation is such that in case the said claimant shall not sustain his said claim, if the said obligors or either of them, or the heirs, executors, or administrators of them or either of them, shall pay all such costs as by reason of the failure of the said claimant to sustain his said claim he ought to pay, then this obligation shall be void, and otherwise shall remain in full force.

And in case payment of any costs shall be awarded in this behalf against the said claimant, and the amount of such costs shall not be forthwith paid into said court, we, the said obligors, submitting ourselves to the jurisdiction of the court, hereby consent and agree that a summary judgment may be entered against us or any or either of us for the penalty of this obligation, with award of execution to be satisfied on making the amount of such costs.

Witness:

E. O. LOCKE.
D. EAGAN.

F. M. HESTER. [SEAL.]
PHILIP BURNS. [SEAL.]
C. B. BERNARD. [SEAL.]

THE UNITED STATES OF AMERICA,
Southern District of Florida:

Philip Burns and C. B. Barnard, the sureties above named, each for himself solemnly swears that after paying his just debts and liabilities he is worth two hundred and fifty dollars in real
13 estate and personal property within the jurisdiction of said court and subject to execution and levy.

PHILIP BURNS.
C. B. BERNARD.

Subscribed and sworn to before me on the day aforesaid, this 18th day of October, 1895.

[SEAL.]

D. EAGAN,
United States Commissioner.

Endorsements: In U. S. District Court for Northern District of Florida. United States vs. 190 Remington Carbines et al. Bond of F. M. Hester, claimant. Filed October 25, 1895. John McDougall, Clerk. T. M. Shackelford, N. B. K. Pettingill, Proctors for claimant.

In the District Court of the United States of America, for the Northern District of Florida.

THE UNITED STATES OF AMERICA, &C.,	} Libel of information.
vs.	
190 REMINGTON CARBINES AND SUNDRY ARTICLES OF MERCHANDISE.	

Know all men by these presents, that we, Philip Burns, as principal, of the County of Levy and State of Florida, and F. M. Hester and C. B. Barnard as sureties, of the county of Levy in the State of Florida, are held and firmly bound unto the United States of America in the sum of two hundred and fifty dollars, to be paid to the said United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 18th day of October, A. D. 1895.

Whereas a libel of information was filed in the District Court of the said United States for the Northern District of Florida on the 4th day of October, A. D. 1895, by J. Emmet Wolfe, Attorney of the said United States for the District aforesaid, on behalf of the said United States, against certain property, for reasons and causes in the said libel of information mentioned; and praying that the same may be condemned as forfeited; which property is set forth and described in the said libel of information (in the case entitled The United States of America vs. 190 Remington Carbines and Sundry Articles of Merchandise); and whereas a claim has been filed in the said Court by the said Philip Burns for his own interest, and as agent for the interest of Henry L. Knight, Perry G. Wall, Jr., C. L. Knight, and J. Edgar Wall, as copartners under the firm name of Knight & Wall, as owners of a part of said property which said part is fully described in the said claim so filed as aforesaid:

Now, therefore, the condition of this obligation is such, that in case the said claimant shall not sustain his said claim, if the said obligors or either of them, or the heirs, executors, or administrators of them, or either of them, shall pay all such costs as by reason of the failure of the said claimant to sustain his said claim he ought to pay then this obligation shall be void, and otherwise shall remain in full force.

And in case payment of any costs shall be awarded in this behalf against the said claimant, and the amount of such costs shall not be forthwith paid into court, we, the said obligors, submitting ourselves to the jurisdiction of the court, hereby consent and agree that a summary judgment may be entered against us, or any or either of us, for the penalty of this obligation with award of execution to be satisfied on making the amount of such costs.

Witness:
E. O. LOCKE.
D. EAGAN.

PHILIP BURNS. [SEAL]
F. M. HESTER. [SEAL]
C. B. BARNARD. [SEAL]

THE UNITED STATES OF AMERICA,
Southern District of Florida :

F. M. Hester and C. B. Barnard, the sureties above named, each for himself solemnly swears that after paying his just debts, and liabilities he is worth two hundred and fifty dollars in real estate and personal property within the jurisdiction of said court and subject to execution and levy.

F. M. HESTER.
 C. B. BARNARD.

Subscribed and sworn to before me on the day aforesaid, this 18th day of October, A. D. 1895.

[SEAL]

D. EAGAN,
United States Commissioner.

16 Endorsements: In U. S. District Court for Northern District of Florida. United States *vs.* 190 Remington Carbines et al. Bond of Philip Burns, claimant. Filed October 25, 1895. John McDougall, Clerk. T. M. Shackelford, N. B. K. Pettingill, Proctors for claimant.

In the District Court of the United States of America for the Northern District of Florida.

THE UNITED STATES OF AMERICA	}	In Admiralty. Libel of Information.
<i>vs.</i>		
190 REMINGTON CARBINES ET AL.		

The claimants in the above cause, F. M. Hester and Philip Burns, by their proctors, T. M. Shackelford and N. B. K. Pettingill, hereby except to the Libel of Information herein filed for insufficiency in the following respects:

First. Its allegations show that the cause of confiscation, if any such exists, is one which is not within the admiralty and maritime jurisdiction, but is within the jurisdiction of the common law side of this court.

Second. Its allegations of fact do not show any violation of any statute of the United States which affects the status of said property therein described, nor any legal warrant of authority for the seizure and confiscation of said property.

In all which particulars the said Libel of Information is imperfect and insufficient, and, therefore, the claimants are not bound to answer the same; and they severally pray that the said libel may be dismissed with costs.

T. M. SHACKLEFORD,
 N. B. K. PETTINGILL,
Proctors for Claimants.

17 Endorsements In U. S. District, Northern Dist. of Fla.
 The United States vs. 190 Remington Carbines et al. Ex-
ceptions to libel of information. Filed Oct. 30th, 1895. John
McDougall, clerk.

United States District Court, Northern District of Florida, at
Tallahassee.

UNITED STATES	}	In Admiralty
<i>vs.</i>		Libel of Information.
190 REMINGTON CARBINES AND SUNDRY ARTICLES OF MERCHANDISE.		Præcipe for Dismissal.

The clerk will dismiss the above cause.

Nov. 13, '95.

Filed November 18th, 1895.

J. EMMET WOLFE,
U. S. Attorney.

JOHN McDOUGALL;
Clerk.

I, Fred W. Marsh, clerk, United States District Court, Northern District of Florida, do hereby certify that the above and foregoing pages, number 1 to 17, inclusive, is a true and correct copy of all papers now on file and of record in this office in this cause.

Given under my hand, with the seal of said United
[SEAL] States District Court attached, this 3rd day of June,
1895.

F. W. MARSH,
Clerk.

By JOHN McDOUGALL,
Deputy Clerk.

[Indorsed:] Certified copy of papers in the case of The United States vs. 190 Remington Carbines and Sundry Other Articles of Merchandise. Issued June 3, 1896, by John McDougall, Deputy Clerk, U. S. Dist. Court, at Tallahassee, Florida.

[Transcript of Record.]

(16,276.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 986.

J. H. S. WIBORG, JENS P. PETERSEN, AND HANS JOHANSEN,
PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF PENNSYLVANIA.

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1 In the District Court of the United States for the Eastern District of Pennsylvania.

Pleas before the honorable the judge of the said court.

It is thus contained :

THE UNITED STATES OF AMERICA	} Of February Sessions, 1896.	
vs.		
J. H. S. WIBORG, JENS. P. PETERSON,		No. 29. Indictment.
and HANS JOHANSEN.		

Be it remembered that at a district court of the United States in and for the eastern district of Pennsylvania, holden at Philadelphia, on the twenty-fourth day of February, A. D. 1896, before the Honorable William Butler, judge of said court, by the oaths of David K. Appenyeller, Daniel W. Cassell, Philip M. Dollard, Calvin Hamilton, Nathaniel B. Keely, Wm. G. Mayburry, Thomas T. Ochs, Allen Rutherford, and Albert Ulrich and by the affirmations of John R. Banes, William Dreinig, Isaac R. Childs, Samuel Diemer, Samuel Dutcher, George S. Hutton, William McAdoo, James McGalvey, Bennerville C. Painter, Willoughby H. Reed, John M. Smith, Edwin Tomlinson, John G. Umberger, and George A. Zacharias, good and lawful men of the said district, then and there empanelled and sworn or affirmed and charged to inquire for the said United States and for the body of the said district—

It is presented as follows :

In the District Court of the United States for the Eastern District of Pennsylvania, February Sessions, 1896. No. 29.

EASTERN DISTRICT OF PENNSYLVANIA, ss :

The grand inquest of the United States of America, inquiring in and for the eastern district of Pennsylvania, upon their respective oaths and affirmations do present that heretofore, to wit, upon the fourteenth day of February, in the year of our Lord one thousand eight hundred and ninety-six, J. H. S. Wiborg, Jens P. Peterson, and Hans Johansen, late of the district aforesaid, mariners, at the district aforesaid and within the jurisdiction of this court, did, within the territory and jurisdiction of the United States, to wit, at the port of Philadelphia, Pennsylvania, within the district aforesaid, begin, set on foot, and provide and prepare the means for a certain military expedition and enterprise to be carried on from thence against the territory and dominions of a foreign prince, to wit, against the Island of Cuba, the said Island of Cuba being then and there the territory and dominions of the King of Spain, the said United States being then and there at peace with the King of Spain, contrary to the form of the act of Congress in

such case made and provided and against the peace and dignity of the United States of America.

ELLERY P. INGHAM,

17 February, 1896.

U. S. Attorney.

4 (Endorsed :) No. 29. Feb'y sessions, 1896. District court United States, eastern district of Pennsylvania. The United States of America vs. J. H. S. Wiborg, Jens P. Peterson, and Hans Johansen. True bill. Isaac R. Childs, foreman. Indictment, beginning, &c., a certain military expedition, &c. Filed Feb'y 24, 1896. Witnesses: Carl Arnsen, Amel Frederickson.

5 Whereupon Alexander P. Colesberry, Esquire, the marshal of the said district, is commanded that he apprehend and take the bodies of the said J. H. S. Wiborg, Jens P. Peterson, and Hans Johansen to answer the premises; which said indictment the said the Honorable William Butler, judge of the said the district court of the United States of America for the eastern district of Pennsylvania, afterwards, to wit, at the February sessions of the said the district court of the United States, held at Philadelphia as aforesaid, on the twenty-fourth day of February, in the year of our Lord one thousand eight hundred and ninety-six, did deliver here in court of record in form of law to be determined; and thereupon, at the February sessions of the district court of the United States for the eastern district of Pennsylvania, held as aforesaid, on the twenty-fifth day of February, in the year of our Lord one thousand eight hundred and ninety-six, before the said the Honorable William Butler, judge as aforesaid, come the said J. H. S. Wiborg, Jens P. Peterson, and Hans Johansen, appearing at the bar of the court in their proper persons, who are committed to the said marshal, and they, the said J. H. S. Wiborg, Jens P. Peterson, and Hans Johansen, concerning the premises in

6 the said indictment above specified and charged on them as above, being asked in what manner they would be acquitted thereof, severally say that they are not guilty thereof, and hereupon for good or ill they put themselves upon the country, and Ellery P. Ingham, Esquire, attorney of the United States of America for the eastern district of Pennsylvania, in this behalf does the like. Therefore let a jury immediately come before the said the Honorable William Butler, the said judge above named here, by whom the truth of the matter will be better known and who have no affinity to the said J. H. S. Wiborg, Jens P. Peterson, and Hans Johansen, to recognize upon their oaths and affirmations whether the said J. H. S. Wiborg, Jens P. Peterson, and Hans Johansen be guilty of the premises in the indictment aforesaid above specified or not, because as well the said Ellery Ingham, Esquire, who prosecutes for the said the United States of America in this behalf as aforesaid, as the said J. H. S. Wiborg, Jens P. Peterson, and Hans Johansen have put themselves upon that jury, and the jurors by the said marshal for this purpose impanelled and returned, to wit:

7 John T. Windrim,
 Erwin C. Gery,
 Joseph B. Hancock,
 Wm. M. Bower,
 Henry C. Phillips,
 Wm. M. Coates,
 Warren E. Perham,
 Wm. B. Phillips,
 Frank Kunkel,
 Miles J. Engle,
 Ellwood Rhoads,
 Charles E. Besore,

being called, come, who, being chosen, tried, sworn, and affirmed to speak the truth of and upon the premises aforesaid in the indictment aforesaid above specified, do say upon their oaths and affirmations respectively that the said J. H. S. Wiborg, Jens P. Peterson, and Hans Johansen are guilty of the premises in the indictment aforesaid above specified in manner & form as they stand charged in said indictment; and thereupon at the February sessions of the district court of the United States for the said district, held as aforesaid, on the third day of March, in the year of our Lord one thousand eight hundred & ninety-six, before the said the Honorable William Butler, judge as aforesaid, come the said J. H. S. Wiborg, Jens P. Peterson, and Hans Johansen, by their counsel, William W. Ker, Esquire, and say that the verdict aforesaid so as aforesaid found and rendered against the said J. H. S. Wiborg, Jens P. Peterson, and Hans Johansen ought not to stand, and that judgment thereon ought to be arrested, and assign as reasons therefor:

1. Because this court has no jurisdiction over these defendants or to pass or impose sentence upon these defendants.

2. Because although the indictment charges that these defendants committed an indictable offence within the jurisdiction of this court, yet the uncontradicted testimony shows that the defendants are subjects of the King of Denmark; that they were in charge of a Danish vessel; that the men and boxes were taken on board the said vessel on the high seas beyond the three-mile limit and beyond the jurisdiction of the courts of the United States of America, and that no overt act or offense as charged in the said indictment was committed by the defendants or either of them within the jurisdiction of this court or any other court in the said United States of America, and therefore this court is without jurisdiction to try these defendants or to impose sentence upon them.

9 3. Because the record shows that this court has no jurisdiction over these defendants or any act performed by these defendants as alleged in the said indictment.

Wherefore these defendants pray judgment, and that they be discharged and acquitted of the said charge contained in the said indictment.

WILLIAM W. KER,

Attorney for Defendants.

And the said defendants, J. H. S. Wiborg, Jens P. Peterson, and Hans Johansen, by their counsel as aforesaid, William W. Ker, further say that a new trial of the issue ought to be granted, and assign as reasons therefor:

1. Because the verdict is against the law.
2. Because the verdict is against the evidence.
3. Because the charge of the learned judge in its entirety was unfavorable to the defendants and had a tendency to influence the jury against the defendants.
4. Because the learned judge erred in charging the jury as follows:

10 "The evidence heard would not justify a conviction of anything more than providing the means for or aiding such military expedition by furnishing transportation for the men, their arms, baggage, &c." This charge of the learned judge indicates that there was truthful and uncontradicted evidence that the defendants provided the means for or aided a military expedition by furnishing transportation, whereas there is or was no evidence that the defendants did, within the jurisdiction of the United States, furnish transportation for the purposes named.

5. Because the learned judge erred in charging the jury as follows: "To convict them you must be fully satisfied by the evidence that a military expedition was organized in this country to be carried out as and with the object charged in the indictment, and that the defendants, with knowledge of this, provided means for its assistance and assisted it, as before stated." There is no evidence that a military expedition was organized in this country. The knowledge of the defendants that a military expedition was organized in

11 this country would not be the subject of indictment unless the means were provided and the assistance rendered within the jurisdiction of the United States, and a mere providing of the means of assistance to be used beyond the jurisdiction is not an indictable offense.

6 Because the learned judge erred in charging the jury as to what constitutes a military expedition as follows:

"It is not necessary that the men shall be drilled, put in uniform, or prepared for efficient service, nor that they shall have been organized as or according to the tactics or rules which relate to what is known as infantry, artillery, or cavalry. It is sufficient that they shall have combined and organized here to go there and make war on the foreign government and have provided themselves with the means of doing so. I say provided themselves with the means of doing so, because the evidence here shows that the men were so provided. Whether such provision, as by arming, &c., is necessary need not be decided in this case. I will say, however, to counsel that were that question required to be decided I should hold that it is not necessary nor is it important that they intended to make war as an independent body or in connection with others."

12 7. Because the learned judge did not affirm the defend-

ants third point without qualification, and because of the instructions given concerning the said third point.

8. Because the defendants' fourth, fifth, sixth, seventh, eighth, and ninth points were not read to the jury or affirmed or refused.

9. Because the learned judge erred in charging the jury, in answer to the defendants' twelfth point, as follows: "They allege that the point off Barnegat where the men were taken on board was not within three miles of our shore; if this be true, and the defendants did not start from our shore under an agreement to provide the means for transporting and to transport the men, but were ignorant of the object of going to Barnegat until they reached there, they cannot be convicted; if, however, they entered into an arrangement here to furnish and provide the means of transportation and provided it, they are guilty, if this was a military expedition, although the men were not taken aboard and the transportation did not commence until the ship anchored off Barnegat;" the

18 effect of the said instruction being to secure the conviction of the defendants for entering into an "arrangement" to commit an offense beyond the jurisdiction, although the defendants were not indicted for a conspiracy.

10. Because the learned judge erred in charging the jury as follows: "The evidence justifies the conclusion that the men were principally Cubans; they came on board the vessel in a body and appeared to be acting in concert under an organization or understanding of some description; they were armed, having rifles and cannon, and were provided with ammunition and other supplies. Some of them, who were able to speak English, declared that they were Cubans going to Cuba to fight the Spanish, and if these men were in combination to do an unlawful act what was said by any of them at the time in carrying out their purpose was evidence against them all as to the nature of the expedition." The defendants were not on trial for conspiracy. The said declarations were made upon the high seas and not within the jurisdiction of the United States and were not made in the presence of the defendants or any of them, and the declarations of persons not indicted with

14 the defendants cannot be evidence against the defendants.

11. Because the learned judge erred in charging the jury as follows: "That this was a military expedition designed to make war against the government of Spain would seem to the court to be free from reasonable doubt." There was no evidence that the men intended to fight against the government of Spain.

12. Because the learned judge erred in charging the jury as follows: "Thus you see what the defendants did. From this and any other testimony bearing on this subject, you must determine whether they understood what the expedition and its object were and had arranged and provided for its transportation when they left Philadelphia or left our shores within the three-mile limit stated." This instruction makes the guilt a matter of intention or preparation within the jurisdiction when coupled with an overt act committed beyond the jurisdiction.

13. Because the learned judge erred in charging the jury as follows: "The question, therefore, is, did the defendants understand they were to carry this expedition and had provided for it and understand what the expedition was before leaving here?" This instruction makes the question of understanding or intent or purpose the test of the guilt of the defendants.

14. Because the learned judge erred in charging the jury as follows: "When the men came to the ship off of Barnegat there is no evidence that the captain or any one of the defendants expressed or exhibited any surprise."

15. Because the learned judge erred in charging the jury as follows: "The captain says he was ignorant of the service required of him until he reached the point near Barnegat. You must judge whether he should be believed or not, and from all the evidence must determine whether the defendants left here with knowledge of and provision for what they were about to do."

16. Because the learned judge erred in admitting as evidence against the defendants the testimony of Carl Arnston concerning conversations between the witness and men on board the vessel not in the presence of the defendants.

17. Because the learned judge erred in admitting as evidence against the defendants the testimony of the other witnesses concerning conversations between the witnesses and the persons on board the vessel; which conversations were not in the presence of the defendants.

18. Because the learned judge erred in charging the jury as follows: "We are suffering to-day as probably no other people suffers from lawlessness, from mobs, lynch law, murder, violation of trusts as the result of want of faithfulness in executing the law. It is respectfully submitted that there was no evidence of the facts so charged by the court.

19. Because the learned judge erred in not charging the jury that the defendants must be acquitted under the evidence. The contradicted testimony shows that the defendants are subjects of the King of Denmark; that they were in charge of a Danish vessel; that the men and boxes were taken on board the vessel beyond the three-mile limit and beyond the jurisdiction of the court, and that no overt act was committed by the defendants or either of them within the jurisdiction of the court.

WILLIAM W. KER,
Attorney for Defendants.

17 And thereupon, at the February sessions of the said the district court of the United States, held as aforesaid on the 17th day of March, A. D. 1896, before the said the Honorable William Butler, judge as aforesaid, come the said J. H. S. Wiborg, Jens P. Peterson, and Hans Johansen, who are committed as aforesaid; and thereupon, arguments having been heard and due consideration having been given to the subject, the court is of opinion that the verdict aforesaid ought to stand and that a new trial ought

not to be granted, but that judgment ought to be entered and given on said verdict.

Whereupon the motions for a new trial and in arrest of judgment are by the court overruled, new trial is refused, and reasons in support of said motions are dismissed.

Thereupon forthwith, all and singular the premises being seen and by the court here fully understood, it is considered and adjudged that the defendant J. H. S. Wiborg pay to the United States a fine of three hundred dollars; that he be imprisoned and confined in the Eastern penitentiary of the Commonwealth of Pennsylvania for the term of one year and four calendar months; 18 that he pay the costs of prosecution and stand committed until judgment be fully complied with, and that he be subject in all respects to the same discipline and treatment as convicts sentenced by the courts of the said commonwealth.

And it is further adjudged that the defendants Jens P. Peterson and Hans Johansen do severally pay to the United States a fine of one hundred dollars; that they be severally imprisoned and confined in the Philadelphia County prison for the term of eight calendar months; that they pay the costs of prosecution and severally stand committed until judgment be fully complied with, and that they be subject in all respects to the same discipline and treatment as convicts sentenced by the courts of the Commonwealth of Pennsylvania.

And thereafter, on the same day, the defendants Jens P. Petersen and Hans Johansen, by their counsel, William W. Kerr and Charles L. Brown, Esquires, come into court and stating that they prefer being sentenced to the Eastern penitentiary for a period of one year, the shortest term for which persons convicted of 19 crime are sentenced to that institution by this court, where the statutes do not impose labor, and asking that they may be so sentenced, the sentences of the court as to the said defendants, Jens P. Petersen and Hans Johansen, are by the court here so amended as to read as follows, viz:

And now, all and singular the premises being seen and by the court here fully understood, it is considered and adjudged that the defendants Jens P. Peterson and Hans Johansen do severally pay to the United States a fine of one hundred dollars: that they be severally imprisoned and confined in the Eastern penitentiary of the Commonwealth of Pennsylvania for the term of one year; that they pay the costs of prosecution, and severally stand committed until judgment be fully complied with, and that they be subject in all respects to the same treatment and discipline as convicts sentenced by the courts of the Commonwealth of Pennsylvania.

And thereupon a bill of exceptions is tendered by the said defendants, by their counsel aforesaid, and the same, being duly signed by the honorable the judge of the court here, is in the words and figures following, to wit:

20 In the District Court of the United States for the Eastern District of Pennsylvania, February Sessions, 1896.

UNITED STATES

vs.

J. H. S. WIBORG, JENS P. PETERSEN, HANS JOHANSEN. } No. 29.

Be it remembered that in the said February sessions, 1896, came the said United States into the said court and impleaded the said defendants in a certain indictment in which the said defendants were charged with an offense under section 5286 of the Statutes of the United States of America, and to which indictment the said defendants pleaded "not guilty," and thereupon issue was joined between them.

And afterward, to wit, at a session of said court held in the district aforesaid before the Honorable William Butler, judge of the said court, on the twenty-fifth day of February, the aforesaid issue between the said parties came to be tried by a jury for that purpose duly impanelled (*pro ut* list of jurors) and came as well the said United States, by Ellery P. Ingham, Esq., United States district attorney, and Robert Ralston, Esq., assistant United States district attorney, and the said defendants by their attorneys, Charles L. Brown, Esq., and William W. Ker, Esq., and the jurors of the jury aforesaid, being also called, came and were then and there in due manner chosen and sworn or affirmed to try the said issue, and upon the said trial the witnesses for the said United States were called and sworn and examined as follows:

21 ARTHUR V. HAZLETT sworn and examined by Mr. INGHAM:

I was born in the United States; I live in Brooklyn and am a steamboat pilot. On the night of November 9th last, about eight o'clock, I was put in charge of the steam-barge Stranahan; we laid inside of Atlantic dock, just inside of King street; when we came there we got a lot of boxes aboard, cases; some trucks brought them there; they were put aboard between eight and nine o'clock; the crew were on board the Stranahan and several people that I did not know; no one seemed to be in charge of the boxes and cases. Between ten and twelve o'clock we left the foot of King street and proceeded down the bay of New York; about twelve o'clock I turned in and went to sleep and did not wake up until seven o'clock Sunday morning; we were then off Sandy Hook point; when I woke up there were more people on board the Stranahan than when we left Brooklyn at night; between thirty and forty; there was some foreign language they were speaking; I do not know what nationality they were; all kinds of looking people, dark-complexioned people generally. We went down south along the Jersey coast, abreast Barnegat light-house; we were looking for a steamer; we found the steamer; she was lying to or at anchor; she was flying a white flag; the Stranahan, when we saw her, put up a white flag; we went alongside of the steamer and delivered the freight we

had aboard the steam-barge; the crew of the steamship handled the cargo; the men went aboard the steamship; she was from 150 to 175 feet long, had two masts and her hull painted black; she was what we term a fruit steamer; I saw a man on the bridge I suppose was the captain; Captain Wiborg resembles the gentleman very much;

22 I was a passenger on board of the Stranahan at the time; I had no conversation with the men on board the Stranahan.

Cross-examined by Mr. KER:

I am not working at the present time for any one. I was not working in last November. I came here to-day the same as I came last time. I was on the tug as a guest. I had no business on there at all, only as a guest.

FREDERICK C. LEE sworn and examined by Mr. INGHAM:

I am an American citizen, live in Brooklyn and am an engineer on steamboats. On the 9th of November last I was engineer on the steamlighter J. S. T. Stranahan. We left the foot of King street, Brooklyn, I should judge, about ten or eleven o'clock that evening. We had on board quite a number of cases of different sizes. We brought it down the bay, and we met a tug below Staten island, and we got on board a lot of passengers, between thirty and forty, I should judge. She was a New York tug, called the Cham, and I think Captain Brantley commanded her. We took the men off the tug Cham in New York bay. I should judge by their appearance they were either Cubans or Spaniards. Before we left King street there was put aboard quite a number of cases, boxes of different kinds, different sizes and different shapes. There seemed to be a man in charge of it. I heard him called "Doctor." It was done in quite an open way. They did not seem to be afraid of anything. After they got the men on board we went out past Sandy Hook and down the Jersey coast as far as Barnegat. A steamer laid there to an anchor. She had a white flag on the forward mast. We had the same kind of a flag flying from our boat. She seemed to be what

23 was called a fruiter, a small-sized steamer. I could not say for sure what her name was. We ran alongside of the steamer, and all the boxes and freight that had been taken on at the foot of King street and all the passengers we took from the tug were put aboard this steamer; also two lifeboats that we had taken aboard at the foot of King street. I saw some cases in the cabin of our steamer. It was some kind of leather or canvass case, as near as I could judge; this was in addition to the other cases.

Cross-examined by Mr. KER:

The steamer that we went to was off Barnegat lighthouse. She was anchored, I should judge, about four or five miles off shore. I think they can anchor possibly as much as ten miles off shore. I think there must have been probably thirty boxes, and I should judge between thirty and forty men. I spoke to a couple of those

young fellows there, and they said they were Cubans. I had no idea where we were going when we left Brooklyn. I was the engineer. The captain's name is William Lint. I have not been arrested for taking these men and boxes. Neither the captain nor the owners of the boat have been arrested.

Re-examined by Mr. INGHAM:

I had a conversation with some of the men we took off the Cham.

Q. Did they tell you where they were going?

Objected to as to anything that was said or took place on the boat in the absence of the defendants. Objection overruled. Exception by defendants.

A. Yes; there were two young men in the engine-room there with me, and I asked them where they were going, and they told me they were going to Cuba. They did not say what they were
24 going to do. That is all the conversation I had with any of the thirty or forty that came aboard from the Cham. They were dressed the same as other people.

JOHN RIDGWAY sworn and examined by Mr. INGHAM:

I am captain of the United States life-saving station at Barnegat. On Sunday, November 10, 1895, there was a steamer anchored off there that day. She came there somewhere not far from ten o'clock in the forenoon and remained until after two o'clock. She was not less than three miles off from shore.

Cross-examination waived.

ALBANUS FALKENBERG sworn and examined by Mr. INGHAM:

I am a member of the life-saving crew at Barnegat station, New Jersey. I was on duty on the tenth of November last. I saw the vessel come up the beach. She anchored off the shoals, and this steam-lighter came down and went alongside, and they looked to be to work there, but what it was they were such a distance off that I could not tell. I do not suppose she was any shorter than three miles off. She was south of the bell buoy, and that is three miles from the shoal—from the outer shoal—and it is fully three miles from the beach. She had not been there more than a few minutes before the tug came there and she went back to the southward again.

Cross-examined by Mr. KER:

The vessel might have been more than three miles from the shore. It was bright daylight.

CLARENCE CRAMMER sworn and examined by Mr. INGHAM :

25 I am assistant light-keeper of the Barnegat light. I was at the *light-saving* station on November 10th of last year; the steamer laid to anchor off shore and a tug was alongside. I saw they were at work transferring cargo, but I could not tell what it was; the steamer was about three miles out, not any shorter.

Cross-examined by Mr. KER :

I only judged the distance the steamer was out by the bell buoy; she might have been a little further out than three miles.

CARL ARNSTON sworn and examined by Mr. INGHAM :

I am thirty years old; am a subject of Norway; my business is a fireman, and have been a fireman about thirteen years. On November 9th, 1895, I was employed as fireman on the steamer *Horsa*; Captain Wiborg was the master; Peterson was the first mate; Johansen was the second mate; the nationality of the steamer *Horsa* was Danish. I signed as fireman of the *Horsa* for this trip from Philadelphia to Port Antonio, Jamaica, and return; she was a fruit steamer. On Saturday, November 9, we left the wharf in Philadelphia between six and seven o'clock in the evening; we took two wooden life-boats besides the boats the vessel had; the steamer carried four boats; the two extra boats were placed in the middle of the ship; Mr. Hart was aboard; when we got down to the Delaware breakwater we went north up along the Jersey coast; to go to Port Antonio the proper direction would be south; we went north and came to a stop off what I heard them say was Barnegat light, and she anchored; she was about two hours lying out; after we anchored a steam-lighter came alongside; then they took some boxes and men from the lighter and
26 two boats. I did not count the men. I heard them say there were thirty-eight. I did not count the boxes; there were many of them, big boxes and small boxes. After taking the men and boxes aboard we lifted anchor and went south. When going towards Port Antonio they broke the big boxes open and took small boxes out of them; then they broke the small boxes, too, and took some guns and rifles out—guns and swords. The swords were about that size (indicating). The guns were distributed among the men that came aboard; each man got a rifle and each man got a sword. The men did nothing that I saw in marching or drilling or anything of that kind. They did not have a commander aboard, as I can say; only they had a big cannon on board, and they fired once with that; they just placed the cannon in the middle of the ship; it was a big cannon, about five feet long, on wheels; they fired the cannon once; that is all I saw. I did not count the rifles, but each man had a rifle, and he kept that rifle while on board.

Q. Did you have any talk with any of these men?

Objected to unless it was in presence of these defendants. Objection overruled. Exception by defendant.

A. Yes, sir. I was going in the forecastle one night, and he told us, "I go down to Cuba to fight."

Q. To fight who?

A. The Spanish.

I just asked him how much the captain got out of it for bringing them down, and he said, "He gets twelve thousand dollars for it;" that was all I heard. I talked with every one.

Q. Was there any one who seemed to be in charge of the cannon?

A. I heard it was a French grenadier. I heard the sailors tell it that the man who fired the gun was a French grenadier.

27 We got off Santiago de Cuba on Friday night at half past ten. After we stopped we lowered the boats down and loaded them with the boxes and men. There were not enough life-boats and we lowered one of the ship's boats. After we lowered it the men came out found out that a ship's boat was leaking. Then they lowered another boat from the ship and took the cargo from the first boat and put it in the next one, and after the boat was loaded we took them by the stern and tried to tow them ashore, and then one saw a light and we cut the ropes. We saw a mast-head light I don't know, but I heard them say it was a man-of-war, and after that we cut the rope and went away to Port Antonio.

There was painting done on board of the Horsa. The name was painted over. What I saw was in the middle. They painted the funnel. The original color of the funnel when we left Philadelphia were black, red, and yellow. They painted it black and red, and when we got into Port Antonio it was black and red.

After the boat started small boxes were thrown overboard. I heard him say that what was in the boxes were cartridges. I saw they were cartridges. I know they were thrown overboard after we left Cuba. I heard the sailors say why they were left on board of the ship. The men in the boats took all they could carry, and these boxes were left aboard behind, and then they were thrown overboard.

Cross-examined by Mr. KER:

I heard forty-eight boxes were thrown overboard. I saw the boxes, but did not count them; somebody told me it was forty-eight. They were small boxes. I joined the Horsa as fireman on the ninth of November of last year. I had been on one trip before. I was on the Leon three trips before I came on the Horsa. I do not
28 know that I had the captain of the Leon arrested for the same thing. I did appear as a witness against him for the same thing in Wilmington, Delaware. After I had been on the Leon I went to the Pinkerton agency, at Fifth and Chestnut streets. I was in the Horsa at that time. On the Horsa there were three sets of firemen, and I was on duty four hours and off duty eight hours. When we got to Barnegat I was off duty. I did not go down in the engine-room; I did not know they were fixing the

engine. I saw the men who were on the tug and I saw the boxes. The men came up on deck, and the boxes were put between decks; they were big and small boxes. I saw a big box there, about eight feet long, that had some wheels in it; the wheels were about four feet. I saw the muzzle or bore of a cannon; it was about six inches. Then the men hoisted the big box with a steam-engine and put it between decks; the men stayed on the vessel between decks; the men opened all the boxes. I saw them open one of them, the one that had the cannon in it; I can't tell how many they opened; I saw about twelve or thirteen boxes opened. I saw them take guns out of two boxes; they were guns and rifles; there was a short gun and a big one; they did not have any bayonets that I saw. Each man had a gun; they were doing nothing with the guns that I saw; they were not drilling that I saw, they did not have any soldier clothes on; they had a belt around here; they had swords about four feet long. I saw some of the men have belts, with machetes in them. I passed Cuba six times and I have been in Cuba. I know we got to Cuba on Friday night; I heard the mates say it was Cuba. I saw San Domingo before we got to Cuba; I saw Hayti and saw San Salvador. I saw two islands before I got to Cuba. The men got off on the east side. When they got off, the ship was on the coast of Cuba. We had Cuba on the starboard side when we went there. All I know is that

29 when the men got off Cuba was on our starboard side.

I do not know that we were near Santiago de Cuba. It was night when the men got off. I do not know how far we were from Cuba. It was raining, and we could not see Cuba after we got the men in the boats. We did not go ashore at all at Cuba. When the vessel started she had four boats, and afterwards four boats more were on board. She usually carried four boats. On this trip she had eight. When she left Philadelphia she had six. I do not know what reason I had for counting them. Before the men got off the cannon was in the middle of the ship. It was the only cannon I saw on board. They lowered it down into the boat and laid it lengthways. It did not take up so much room; it left room for a man to row. They put the wheels in the boat, too, in the same boat with the cannon. The cannon had three wheels; two were large and one was small. Five boats went away from the steamer. The men on board rowed them. The boats were towed—not so long—about a ship's-length—about five minutes—then they left the ship and did not come back.

The ship was painted all over before she came to Cuba. I do not know that she was painted after she had been at Cuba. I do not know how many times a year a vessel is painted. Some ships paint them every trip—the funnel. It is a common thing to do it. They scrape the funnel first and then paint it red. Then they paint it any color they intend to paint it on top of the red. The sailors threw the boxes overboard. I did not handle any. I saw some other boxes of the same kind, and there were cartridges in them. I do not know what was in them. When I went to Jamaica I went

on shore and got drunk, and was brought on board by the police and was put in arms. I do not know that I told the captain and officers that I was going to give them trouble. My wages
30 on board that boat were twenty-five dollars a month. I have not been on any boat since November last. I am living in Richmond, Philadelphia. The Spanish consul, I believe, is paying my board and is giving me two dollars a day, and ever since last November I have been getting two dollars a day.

OSCAR SVENSEN sworn and examined by Mr. INGHAM :

I live at No. 126 Union street, Philadelphia ; am a Swede ; am twenty-two years old, and my business is a fireman on ocean steamers. I was on the steamship Horsa on the trip she took on November, '95. We went out about between six and seven o'clock. When we came to the breakwater it was my watch ; after we left the breakwater it was my watch below and I turned in. The next day I came on watch at eleven o'clock. I guess it was about half an hour I was down firing before we stopped. When I came on deck we were right outside Barnegat light-house. A lighter came alongside and there came some men on board and some boxes ; between thirty and forty men and several boxes. I could not tell how many boxes there were. I saw only big boxes. I went down in the engine-room and told my mate, "I think *the* go and do some expedition to Cuba and so I won't go along," and my mate says, "We go to the chief and tell him." We went up on deck, and the other fireman came down and went to the chief engineer and said, We won't go along down to Cuba ; so he said, "You fellows don't need to be afraid ; my life is just as dear as your lives." The chief was talking to the captain about this, and the captain said, "That will be all right," and we did not get any satisfaction about it. We could not go ashore or could do nothing, and so I had to go down below again and was working. After we went from
31 Barnegat light-ship I was on deck several times and saw several boxes opened there, and in one of those boxes I specially saw was one machine cannon. I heard them shoot off that cannon and went on deck to see what it was and saw the smoke of it, that is all, and saw a man standing there talking. He talked some language ; it was Spanish or some other language that I did not understand. I heard one of these men tell me he go down to Cuba, fight the Spanish, and they had these knives ; they call them in Spanish machetes ; they were knives and revolvers ; the knives they hanged in a belt ; they hang in a scabbard. I did not take much notice of them ; they carried them in belts. I do not know that they were what they usually call a sword, such as officers carry. I saw some of these men have rifles. I saw two or three men were drilling and had some exercise, but I did not understand what they were talking about. I understood it was exercise, because he was talking to them and he had different movements and they lifted the rifles up, so I could understand that there was some exercise ; it was only once. The men had different caps, every one

of them nearly with a flag in it; most of them had caps with a flag. I asked several of them, and they said it was a Cuban flag. When we came down to Cuba I did not know it was Cuba, because I did not see any land. Those fellows had some belts around them to put some cartridges in, and they had small boxes that they took out of the big ones; two men were sitting there, and one said to me, "There is going to kill a hundred Spanish with them," as much as I could understand. They took up different small boxes; they opened them and took some cartridges out of them and put them in their belts. The chief gave them some canvass, and they made small bags that they carried those cartridges in, and there—lots of them sitting there working.

32 When we came down to Cuba, when we stopped, I was sleeping, but I waked up after eleven o'clock. The men put some of those boxes in the boats, but I did not take much notice of it. I only saw they were working, putting it in the boats. I heard the captain say, "Try to get them out; I don't care for them any more," and the chief engineer was getting them in the boats. I heard the captain say they were going to send those boxes they couldn't take in the boats. The captain said he wanted to keep those boxes, and when he came back he was going to deliver them ashore, take them up to Philadelphia in some way. I did not see the boats start off, because I was in the engine-room. I heard the chief singing out on the skylight, "Go easy, as easy as you can be, we are going to tow them." The next was between five and ten minutes I came up and heard, "Shake them up." Then we shook up the fire and made good speed. The next day some of us took the boxes off because they said, "We are going to throw them over-board." The mate said, "We won't keep any of those boxes, because they look after them when we come to Port Antonio." He said, "If you fellows take those boxes out of here they will look after them when we come to Port Antonio." A man named Mike had one box and I had one myself. The mate came and told me I would have to give it up—they were going to throw them all over-board—and I gave it up.

All I know is we scraped the funnel and painted it red. I do not know what color it was when we came back.

When the men came on board at Barnegat we went to the chief engineer and told him, "We won't go along; we want to go ashore." The chief engineer said, "What's the reason?" The chief engineer told us that his life was just as dear as our life was, but we don't need to be afraid to go along. The captain came over and

33 the chief said to the captain, "You'll make it all right, won't you?" So the captain says, "Yes; that'll be all right." We did not get no satisfy about that. The chief engineer told the captain, "The men won't go."

By the COURT:

Q. Won't go where?

A. Down to Cuba.

Q. Then what did the captain say?

A. The captain says, "We'll make that all right." Then he went. He was in a hurry, I guess.

Cross-examined by Mr. KER:

I come from Sweden, and have been a fireman six years. I have been in the Horsa five trips. I know Arston and Frederickson; they were firemen on that voyage with me. I cannot tell how many boxes there were. I saw several boxes; they were different sizes. There were between thirty and forty men. They were dressed like you and me when they came on board. All that I saw them doing on the vessel was they had rifles and cartridges, and I saw three men had some exercise one day there with the rifles; two of them were standing in line, and the third one gave them exercise. I don't know what the rest were doing. I only saw them exercising once. I saw the cannon. All I can say it was about five or six feet long and about half a foot in diameter. The wheels were about three or four feet. I did not see anybody firing the cannon off, but I heard it all right. I went right up so that I could see the smoke, too. I heard it only once. I took a box of ammunition. I did not look what kind was in the box, but I was one of the other boxes open. I took the box just to keep it for myself, just to see what it was. My wages aboard the steamer were twenty-five dollars a month. The first time I told the story was two weeks ago to a man from Pinkerton's detective office. I now get two dollars a day and my board.

LUDWIG G. JENSEN sworn and examined by Mr. INGHAM:

I am a native of Norway; am twenty-five years old; am a subject of Norway, and my business is fireman on sea-going vessels. I was on board the Horsa on her trip from Philadelphia on the ninth of November last. We left in the evening, Saturday evening, between six and seven, and went down the Delaware and went north. About noontime we went to anchor. There was something wrong in the engine-room. I know that something was the matter. Between 1 and 2 in the afternoon the same day a steam-lighter came alongside of us, and a number of men were received aboard with boxes. There were between thirty and forty men and just as many boxes. We passed down the coast. On Friday evening, at ten o'clock, we stopped. We didn't drop anchor at all. The boats were lowered and the men put in them. The four boats were lowered, and the men in them couldn't carry all the ammunition with the four boats, so the captain gave them another one—one of his own boats. When that boat was put into water it sunk. The captain gave them another one, and it was stronger than the former one, so they stowed the cases or boxes and what they had and themselves in the boats and connected one with the other and went astern of us. We towed them towards the shore, I think. The night was dark as pitch. I don't know how far we were from land. We couldn't see land. It was dark before twelve, and after twelve it

35 started with a shower of rain. Just as we kept slowly ahead a strange light was seen, and they thought it was a man-of-war. They cut the rope, the small boats astern of us, and we went full speed ahead.

The first day the men came aboard they were not doing much, because it was bad weather; some of them were sea sick and couldn't do nothing. The next day when we came into smooth water they got some canvass and sewed some small bags to put cartridges in; you know what they have over their shoulders; they opened the boxes and took out all the rifles and gave each man one rifle; the men said there was 150 spare rifles after each man had got one; those were put into blankets: there was a big bale of blankets came aboard, too, at the same time; the blankets were in a white bag; all the rifles were wrapped up in blankets in small bundles, five in each, I guess, or something like that; the rifles were taken out of the boxes and the boxes were thrown overboard.

The men didn't seem to keep a secret of where they were going or what they were going to do, so they told plainly that they were going down to fight the Spaniards; each man was given a rifle and a sword or machete, I think; it was not a sword that they use here, not that any soldier used that I ever saw before; it was a sharp cutting instrument of some kind. Some of them had belts and others hadn't; there was three kind- of cartridges and two kinds of rifles; there was small Winchesters for the cavalry men and other big rifles for the infantry; that's what they told me; the officers have big revolvers. I know from the boxes they opened that there was four kinds of cartridges, one for the machine gun; the man in charge of the gun told me that it was a Maxime repeat firing gun or something like that; it was worked with a slot and a crank; I saw it work and I saw them practicing on it, and he showed me how they were doing it. I was there when they fired a shot. I heard it

36 was a French Canadian who had charge of the gun. It was what they call artillery; a small, light gun. I think it was about four feet or four and a half. The cartridge measured about two inches in diameter; it was worked by a slide. There was a crank on one side. They turned the crank off. The slide would come out, and there was a hole to put the cartridge in. Then the crank was turned on the half and the gun was shot. They put the cap in with the trigger; they had a line attached to it, and there was a man on the side of it firing.

After the weather became settled they opened the boxes. One day they were going to practice with the machine gun and were going to open the boxes to get cartridges for the gun. In one case there was a wrong mark. I think they were talking Spanish. They opened the wrong box; they opened a box with medicines and bandages in it. The man in charge of the gun drilled with his men. I should think he had about six or seven men; he put every one of them in their right places. I did not see any other drilling done aboard the ship; no other. I heard that every one that had a revolver was an officer, and they had different kinds of

swords; more like the swords they use here. There was one that seemed to be in command of them; they called him captain or something like that. He was an old man; he was said to be the man in command of the forty or fifty men. They threw overboard a number of boxes. The small boxes were taken out of the big boxes that came aboard. They were cartridges, I was told, for the Winchester rifles.

Off Barnegat six or seven of us went to the chief engineer. We asked him where we were going to—we knew we were going to Cuba—so he says, “We won’t risk it for our wages.” Well, I think then the captain came along, and he says, “What’s up here?”

37 The chief engineer says, “The men won’t go without they get something for it;” so the captain says, “If anybody should get hung, it’d be me and not you.” The captain said, “It’s me that’d get hung if anybody should happen to get it.” The language he used—he said, “Go down below and not see what’s doing or being done.” The shipping master, Mr. Larsen, gave me \$25 after I got back here to Philadelphia; I don’t know where it came from; I got it all right and that’s all I cared for. I did not testify before Commissioner Bell; I had no business to go up; the captain did not say anything about it.

Cross-examined by Mr. KER:

I am a Norwegian; I have not become an American citizen; I never thought it necessary. I spoke to the chief engineer and he did the talking with the captain. He said that if anybody should get hung for this it would be him and not us, so we didn’t have anything to care for; that we shouldn’t care. That’s all he said. There were as many boxes as the men, between thirty and forty. I did not see forty boxes thrown overboard; the boxes thrown overboard were all containing cartridges. I saw six men at drill at one time, drilling with a gun; it was iron or steel, I believe. I should think the wheels were four or five feet. The only drilling I saw was amidships. The gun was not pointed over the side. I saw the man drilling with that gun once in the daytime. The men were all going around the deck just like ourselves, walking and lying around and some sitting around. For each man I saw I saw a rifle, because they always carried them with them around the deck; they were walking around the deck with rifles. None of them had bay-nets. I know they were rifles by looking at the outside of them; I never handled a Winchester. I don’t know anything more than they told me; I do not speak Spanish; they talked to me in English; I

38 should think more than half of them, or about half of them, spoke English; some of them were brought up in this country and some were born Americans. They took away with them all the boxes they could get in the boats. They did not throw any boxes overboard. They left them there for the crew to throw them over. My wages were \$25 a month. I first told this story sixteen days ago to an officer or clerk at the Pinkerton office. Mr. Larsen, the shipping master, gave me \$25 when I came back to Philadelphia.

I don't know what it was for. I should be a fool if I didn't take it I didn't ask any questions. I know it was coming to me. I get \$2 a day, paid to me at the Pinkerton's office. Oscar Svensen, the witness before me took me there. They took my statement down in writing. They typewrote it. I have read it twice—three times.

EMIL FREDERICKSON sworn and examined by Mr. INGHAM :

I am a fireman. I was on the Horsa from November 9th to 27th ; was shipped here in Philadelphia as a fireman. We left here Saturday night. The next morning I went to sleep at 4 and slept till 7. When I had breakfast somebody says, " We didn't go down ; we came up to New York." I saw land on the port side, a sandy coast like the American coast. Somebody told me we were going up to take ammunition on board. Some of the crew said that, the donkey man. We came to a stop at Barnegat light. A steam-lighter came alongside, named the Stranahan. Aboard the steam-lighter was about thirty or forty men and thirty or forty boxes of different sizes. They came aboard. John Hart, the charterer of the ship, was on board from Philadelphia. I saw him when I woke up that morning. The anchor was dropped. They put those thirty or forty men on board. Then we hove the anchor and went down south ; got the land on the starboard side.

39 We went down to Cuba. We did not touch at Cuba. We passed it so that we could not see it. We stopped Friday night—between Friday and Saturday. We put those two boats out that came aboard in Philadelphia ; that came with that steam-lighter. About 11, when the first boat was out, we started to get the ammunition. The boxes were put in the boat. The whole party of men and boxes left in the boats. On the way down, after we left Barnegat light, the men emptied the boxes. There was a big one with a cannon in it. That was the only one. There were others smaller, with two wheels. In the other boxes there were rifles—longer and shorter rifles—two sizes of rifles. They put them in blankets. Each man got one, and the rest they put in blankets. They were put aboard the boats and taken ashore. I saw the men drilling on their way down. I saw the cannon put upon a wheel and something put underneath, so that the cannon could stand up. One man was standing behind and two standing there, and the officers had spoke only English were standing there. They were drilling. One was cleaning with some arrangement with the ammunition. They were only playing that—drilling. I did not see them make use of the rifles. They lost one rifle overboard. There was a man to look after the gear.

By the COURT :

Q. Did you go with the other firemen and express your dissatisfaction off Barnegat ?

A. I went down in the stoke-hole. A shipmate says, " Come up ; somebody wants to see you." I went up on deck, and when I came he says to me, " We want to see the captain about this game."

Q. Who said that ?

A. The man that was first here this morning, Svensen.
40 He says, "We'll see the captain about this game, or the chief engineer. We won't go down there and get shot." The chief engineer was coming along, and we says to the chief engineer, "We won't go down there. We didn't sign for that. We were going in the fruit trade; we didn't go aboard for that," and he says, "Only you shut your mouth and keep quiet. You have no business with that; you have nothing to do with it." He asked me if I was afraid to go down there, and I says, No. He says, "Go down and look after your fire. You have nothing to do up here." I says, "All right." The captain passed by, and the captain says to the chief engineer, "What's the matter?" "Oh, he says that he won't go; that he's afraid." The captain says, "Shut up; shut your mouth. You've nothing to do with that. Go down where you belong to. Get away." I couldn't see the country or anything. I went down.

By the district attorney:

Q. Was that all the captain said?

A. Yes. That I heard before he went down. Well, the captain was talking about something that he would pay us extra for. He said that at the same time. He said, "Pay extra;" that was all. When he went away he says, "We'll pay you extra; go ahead." About half of the passengers could speak the English language. There was a young fellow looking a little sick of it. I says, "What's the matter with you." He says, "I don't care to go down there." I says, "What did you went for?" "Oh, well," he says, "my father and mother was Cubans, and talked a long time to me, so I went." The Cubans called one of these men captain. I don't know what he was. He only spoke the English language. About eight o'clock he says, "Well, when it comes—the gunboat here—will you men help us to fight?" He said that about
41 two hours before they went into the boats. He said, "Will you fight when there comes a Spanish gunboat?"

He said that to me. "We'll give you a rifle each." Well, I say, "I don't care." He was the same man that drilled with that cannon. He was talking the English language. He did not speak Cuban himself, and had to get a man to speak for him. He was the man who had charge of the cannon. He looked like a man who had been a soldier before, an officer in the army; how a man looks who has been an officer. He has a military size, and he always is straight, and looks like a soldier; puts his head up.

Cross-examined by Mr. KER:

I may have forgot something. I had answered what I was asked. These men had rifles and a cannon. They had wheels underneath them; wooden wheels with an iron ring around and a little iron wheel; three wheels. It wasn't so heavy. I should think two or three men could carry it easy. When we were talking to the captain we weren't talking about money at all. The men drilled.

The cannon was set up on deck on a wheel. Two men were behind the cannon. Then they carried ammunition to the cannon. One officer was standing one side of the cannon, and some there, and other men over here. There were six or eight officers, but there was only one man that they called officer. The Cubans called him captain. I don't know whether he was a captain or not. I did not see the men drilling with rifles. None of the men had soldier clothes on.

My wages were \$25 a month. Some time last November I went to the Spanish consul. I went over to New York and hunted up the barge and the tugboat and the witnesses, and brought the witnesses here. I took charge of this case. I started it; I caught it;

I picked it up; I fixed the thing up; I saw the witnesses and
 42 fixed it up. I am not an American citizen. I have declared my intentions and want to become a citizen of the United States. I am a Dane. Denmark has some islands down in the West Indies. When the Horsa was a Spanish steamer down in those Danish islands I won't keep quiet or say that was all right. I would not have the Spaniards do anything against my country, and I don't want a Dane to go against Spain. I get \$17 a week. The first time we came to New York I told the Spanish consul I must go to sea again. He asked me where I was living and how much I got as a fireman. I say I have been firing for \$40 a month and my feed, and I have been working for \$15 a week fireman, and I have been working at that in Philadelphia, and he says, I'll pay you firemen's wages. I get my money myself, my \$17. I have paid out of this \$17 my board, clothes and everything else. I get my money cash in Pinkerton's office, down on Chestnut street.

H. C. B. MURRAY sworn and examined by Mr. INGHAM:

I live at Port Antonio, Jamaica, and am assistant collector of revenue under the English government. The Horsa arrived on the 16th of November, and I boarded her. Captain Wiborg informed me that he had very bad weather and had lost several of his boats overboard. I noticed that the forward port was open, and in asking him to explain it he said that he had been cleaning out the hold. I made search of the ship, and found nothing particular then, but by-and-by, from information that I received from Frederickson, upon a research in the forecandle I found a canvass bag containing 60 cartridges. We had a case against him in court, but
 it was withdrawn. I noticed the funnel was red and black.

43 Before she was painted yellow and red, but on this occasion the funnel was painted red and black. On the former trip she had the name "Horsa" written amidships, and on this occasion it was painted out red.

Cross-examined by Mr. KER:

I made a thorough search of the vessel. I found nothing the first time. The second time I found a bag of cartridges. Frederickson simply intimated there was some ammunition on board, and I

searched for it. I know that the J. D. Hart Company have been trading to Port Antonio for a number of years and have a legitimate business in the fruit trade. The captain told me he had had bad weather. I examined the ship's manifest, and it was all correct. I came here at the instance of my government and am under the impression that I was sent at the request of the Spanish government. I came here in December, and have been here ever since, at the expense of the Spanish government. I believe my hotel expenses were paid by the Spanish government.

By Mr. INGHAM:

Q. What do you know of any condition of war or insurrection in the island of Cuba?

A. I don't know anything about it.

Mr. KER: I will relieve the district attorney and the court on that subject. I will admit that there is an insurrection in Cuba, and that the Cubans hold two-thirds of the entire island. I will admit that there is a war and will admit that these defendants know it.

JABEZ BOWEN sworn and examined by Mr. INGHAM:

I live at Port Antonio, Jamaica, and am one of the water police in the service of the British government. I made a search of the Horsa at the request of Mr. Murray and found in the fore-
 44 castle, underneath one of the lower bunks, a small bag containing cartridges, and I handed them to Mr. Murray. I did not see the name of the Horsa written amidships. I saw red paint standing over where the name used to be. I also noticed that the funnel, which was yellow, red, and black, was painted all over in red.

Cross-examined by Mr. KER:

Neither the captain nor mates of the ship were present when I found the bag of cartridges. I came from Jamaica and have been here since last December. The Spanish government paid my way.

LUDWIG JANSEN recalled and examined by Mr. INGHAM:

I believe it was twenty-five persons that composed the crew of the Horsa, exclusive of the officers. The officers were Captain Wiborg—Mr. Petersen was the first mate; Mr. Johansen was the second mate. There were three officers down, subordinate officers. The Horsa was a vessel plying in the fruit trade between Philadelphia and Port Antonio.

The Government's case rested.

The case for the defendants was opened by Charles L. Brown, Esq.

CHARLES VITHOLM sworn and examined by Mr. KER:

I was on board the Horsa on the ninth of November last year, when she sailed from Philadelphia. I was third engineer at that

time. I know these firemen that have been on the stand; they were on the vessel on that trip. When the men came on board at Barnegat I was not on deck and did not see what came on board, neither the men or boxes. During the voyage to
 45 Jamaica I saw some men on board; I saw some men on deck, about twenty, all around the deck. Some of the men had guns in their hands and some put them on the hatches and anywhere. It was about from ten to twenty guns that I saw. Some had guns and some had none. The men were not drilling. If they had been drilling I would have seen them sure. Some of the guns were rifles; double-barreled rifles we would call them at home. I saw a cannon on board. It was about three feet high. I did not see or hear that cannon fired off. If it had been fired I would have heard it. The ship was a small ship and I must have heard it. I did not see the men drilling with the cannon; I did not see the men get off the vessel; I was not on deck at the time. The funnel was first scraped, then painted red, and then yellow paint put over the red; that is the way to keep the rust away. I have been in vessels that painted it three and four times a year, and some only two times a year. The men that I saw on deck were not dressed as soldiers. Some of them had knives—machetes. They were banana knives, for cutting the grass and to cut bananas. I have been in Cuba—over the whole of Cuba—and saw those knives. The men who work on ships or in the country use them. They use them on their sides, the same as soldiers; they use them to cut bananas, to cut down coconuts and sugar-cane, and they use them for everything else; that knife is just as handy to them as a pocket knife to me. They carried them on their sides; some in belts and some not, and some have a string and all working men carry them.

Cross-examined by Mr. INGHAM:

I did not see the men come on board. After they came on board I saw them about the vessel, on deck. I do not know when they got off; I did not see them drill. I did not hear the cannon
 46 fired; I saw the cannon on deck, on wheels on small wheels; I did not see them take the cannon out of the box. I did not see the men all wear a little Cuban flag on their hats; I did not see any of them have a Cuban flag.

G. A. MACHOLD sworn as interpreter.

DOROTHEA NELSON sworn by the interpreter and examined by Mr. KER:

I am the wife of the chief engineer of the steamer Horsa. I was on the steamer on the ninth of November, when that steamer sailed from Philadelphia to Jamaica. I occupied my husband's cabin or state-room—that is, part of the cabin—and ate in the captain's cabin. During the voyage I was on deck most of the day. I saw men on the ship differing from the crew and officers; about fifteen or twenty men. Some of them had guns; I did not notice how

many, but I saw from ten to twelve at one time. The men were dressed like the crew of the ship; they had all kinds of clothing on; they were not dressed like soldiers; some of them had belts. I did not see any drilling at any time. I saw a cannon on board, about three feet high and three feet long. I did not hear the cannon fired during all the time I was on the vessel; it could not be fired without my hearing it.

EDWARD W. PAXIS sworn and examined by Mr. KER:

I have served as a soldier of the United States. I have been in Cuba; have seen the people there; am somewhat familiar with the plantations; have been on them, and have noticed the people in their manner of life and what they used.

(Machetes shown witness.) I know these things; they are machetes; they are of different sizes and of different make.
47 I have seen the people in Cuba have them. As a rule butchers, everybody, carries them outside of the main cities. I have seen them in a scabbard, some without a scabbard, and some with a belt. The majority of the people carry them; they use them for general use in agriculture, for general utility, the same as the farmer would a hoe, and I have seen them in the houses, and they are generally used.

Cross-examined by Mr. INGHAM:

I have never seen children play with them; no. I should suppose it is formidable weapon. I have seen the military in the ports. I have never seen citizens carry guns.

HERBERT P. KER sworn and examined by Mr. KER:

I have been on most every island in the West India islands. (Machetes shown witness.) I have seen these instruments. They are machetes. I have seen them in Jamaica and Barbadoes and nearly every island in the West Indies. There are different makes of them and different sizes. They are used for cutting down banana trees, cutting grass, &c. Most all the inhabitants carry them. They are in common use. They wear them around their waists attached to a strap or belt; sometimes over their shoulders attached to a sling or string. I have been on the Horsa. I took a trip on her to Africa. About between two and three months I was on board. That was last March. I noticed the name of the Horsa on the stern of the boat. It is in brass letters about six inches long—raised letters—raised about an inch—that stand away up from the hull of the vessel. I have seen the vessel painted at sea on numerous times—her funnel. They first chip it off with a hammer, then put red lead on it to keep the rust out, and then they paint it any color they want after that. I have seen it done at sea on more vessels than one, and it is generally done when they get into the warm climate.

48

FREDERICK SVANOE sworn and examined by Mr. KER :

I was captain of the steamer Leon, and have been to Cuba very often. (Machetes shown witness.) I know these instruments; they are called machetes.

The COURT: I think that is sufficient proof. There is no question about this at all.

Mr. KER: I want to show that these are instruments for agriculture, in general use, carried by most of the people.

J. H. S. WIBORG sworn and examined by Mr. KER :

I was captain of the steamship Horsa; it will be two years in May since I took charge of her; I was her captain on the voyage on the ninth of November of last year; we left Philadelphia between six and seven o'clock in the evening, bound for Port Antonio, Jamaica; I had cleared from the custom-house. The Horsa is a Danish vessel, sailing under the Danish flag. Before leaving Philadelphia the name was scraped out on her side because it was rusted and painted over with red lead; it was done by my order, and no changes made in the other names; there is the name on the stern, brass letters, riveted on the stern, standing out about three-quarters of an inch and about six or eight inches long; the name is on the bow, the same kind of letters and the same size as on the stern. I was sailing under charter from John D. Hart & Co., in the fruit business, and were then sailing for a cargo of fruit. When we left Philadelphia we had as cargo two boats and a lot of empty boxes and barrels, and had two horses, some horse food, and bails of hay and bags of corn; they were on the manifest.

Before sailing I received a message, which was, after I passed the breakwater to proceed north near Barnegat and wait further
49 orders. I left the pilot at the breakwater and steared north according to my orders; I stopped off Barnegat, between four and five miles off shore, as near as I can judge, and anchored. I anchored because one of the engineers came up and said that one of the bearings was hot, and he would like to have an hour or two to fix this bearing; then we anchored to keep in smooth water to give him a chance to do this, because it was blowing a gale of wind from the northwest.

A tug or lighter came to us; in the tug there were a lot of men; they brought a message; there was a man brought me a message from John D. Hart & Co. He told me to take those men and luggage and whatever they had aboard the Horsa and let them off whenever they called for it to be let off. I shipped two boats at the same time, and the order of my message was to deliver those two boats to those men and the two boats that I had shipped here in Philadelphia. The boats that I had shipped in Philadelphia were cleared for Port Antonio, Jamaica, and the first intention was to deliver them at Port Antonio, Jamaica. The only order was they had a colored man there that they called the pilot, and whenever he called for them to be let off I should let them off and give them the boats.

By the COURT:

Q. What were you to do with the boats that were taken from Philadelphia and the boats that were taken on off Barnegat?

A. To deliver them to these men as soon as they called for them.

By Mr. KER:

The men walked through the port on the between decks. The ship had three decks. The between deck was the second deck of the ship. They had a lot of boxes and their luggage, and
56 they were stowed away on the same deck, the between deck.

My men helped to put them aboard. We helped them to get the luggage aboard. The boxes were of different sizes; the largest was about six feet long; there was no block or tackle used in hoisting them up; they were all lifted aboard; a tackle was used to hoist the boats aboard.

After the men got aboard I sailed on my course on down past Watling's island on Salvador, as usual, and kept on down to Jamaica. Watling's island was the first land we sighted, after we left Barnegat. It is called Crooked Island passage. There is a number of islands and it is called Crooked Island passage. We can see those different islands one from the other. After we get out of the passage Cuba is about south by east. Going down to Jamaica we always strike Cuba and sail along the coast for about six hours. From there San Domingo is visible on a clear day, and Hayti.

The men got off about six miles off the Cuban coast. The colored man that they called the pilot came and told me to let them off. I stopped the steamer and lowered the boats in the water. The men got off through the port. They took their boxes with them, not all of them, but the biggest part of them. They did not have enough boats. At first they had four boats and I sold a boat to them. It was not my boat, it belonged to the owners of the ship. The boats were lowered aft and they were all tied to each other at the stern. They asked me to take them further in and I said I would do it. I towed them about fifteen or twenty minutes along shore and I saw them leave the ship.

When the men came aboard they had not the appearance of soldiers. When I started from Philadelphia I did not know that we were going to take these people and their goods on the Horsa.

According to my opinion I had no right to refuse to take
51 them. My charter called for me to do whatever the charterer sends me between the St. Lawrence river and the River Platte.

By the COURT:

Q. Have you the charter here?

A. I haven't got it, but I can produce a copy of it.

By Mr. KER:

Q. Where is the charter?

A. In the agent's hands in New York; I can produce a copy of

the charter by to-morrow, because I am sure there must be one at the charterer's office; he is supposed to have one.

The men slept between decks; they were not in the cabin; my vessel did not supply them with food; they brought their own food—canned goods and hard-tack; they had it in boxes; there were thirty-nine men. I did not count the boxes, but I suppose there were about forty-five, as near as I could get. I did not say all the boxes had canned goods and hard-tack in them. I said they brought boxes with their own food; where they had tin cans with them some of the boxes contained that, and those they had between decks; they fed themselves; they did not call on the ship for any food.

Some of the men on the ship had guns. I saw about half a dozen. I did not examine the guns; there was not anything to attract my attention to them; it did not attract my attention because the men had guns. I have often seen passengers carrying guns aboard my ship. I did not see the men drill. I saw the cannon. I did not examine it; it did not attract my attention, because it was about the same size—a small gun—a cannon about the same size as the ship's cannon, say about three and a half feet long. I did not notice it at first. I did not know it was my own or theirs when I first saw

52 it; when I first saw it I thought it was my own. I had a cannon on board of the same size. I had two of them, one of about the same appearance and the other was a small brass gun. The cannon they had they took in the boats with them. I did not see any ammunition for a cannon. I did not see any of the boxes broken open, and did not know that the boxes were broken open and arms taken out. When the men got in the boats the men had their guns and their machetes. Some of them had guns and some had not.

By the COURT: Some of them were carrying guns when they got on the boat?

A. No, sir; nobody was carrying guns when they got on my boat.

By Mr. KER:

When they came aboard I saw no arms. I do not know where they got them. When they left some of them had guns. Some of them had machetes. I saw plenty of them before. They would not attract my attention.

During the voyage the funnel was painted; that is not anything unusual. It is painted when it is needed, generally three or four times a year, at least. The name was not painted out on the stern nor on the bow.

When the men left the vessel the boxes that were left were thrown overboard by my orders. I did not open any of the boxes. There seemed to be something in the boxes. I do not know what was in the boxes. I wanted them thrown overboard.

By the COURT:

Q. Why?

A. Because I could not come in the port of Antonio.

Q. Why not?

A. Because they would have seized the ship and the boxes too, and I would get in trouble in Port Antonio.

Q. Why would they seize the boxes?

53 A. Because they were not manifested for Port Antonio.

By Mr. KER :

If they were not on the manifest, there would have been trouble in part in Port Antonio ; not all the boxes that were in the hold were thrown overboard, because there were a lot of large empty boxes ; some of the boxes were full, some were open, and some empty. I saw empty cans around them ; my orders were to clean out the hold.

At the time we left Barnegat the firemen came to the chief engineer. I suppose there were about five or six of them. The spokesmen were Lew Johnson and Emil Frederickson. They talked to the chief engineer, and I came along and said to the chief, What is the trouble here? and he said, These men won't go unless they get some extra pay. I said to them, " You better go down below and mind your own business ; you have nothing to do with that. If there is anything wrong, I will take the responsibility."

These men (pointing to the two mates who are the defendants) had nothing to do with this ship or with this business. They listened to my orders ; they were under my orders. I was the master of that vessel. I am responsible for all that was done. I know if I go to a Spanish port again my life would not be worth a pinch of snuff, but I will take that responsibility.

When I was taking the men and their boxes on board I did not know there was anything wrong in it. I did not suppose there was anything wrong in it. I do not know where they went to. I do not know whether they went to Cuba or not ; all I know is I left them out at sea, about six miles off the coast. None of the men told me they were going to Cuba. The pilot did not tell me where he was going. I did talk to him, but he could talk very little

English. I did not think there was anything wrong about
54 it. If there was anything wrong about it, I am willing to take the consequences.

Cross-examined by Mr. INGHAM :

I am a Dane, and am still a subject of the Danish government. I have been in the employ of John D. Hart & Co. two years next May coming and have been engaged in the business of sailing a fruit steamer from Philadelphia to various West India points. I had a charter-party which gave me a range from the St. Lawrence river to the River Platte, in Brazil. I got that sent from my agent in New York. I got that as soon as I came over and took charge of the ship. There have been three different charters from the same man, Hart, with the same clause in it. I got that charter as soon as I took charge of the ship for John D. Hart & Co., and that was two years ago. The charter does not state that I was to sail a fruit

steamer from Philadelphia to Port Antonio and return, but I was doing that; as a general rule I made a voyage every fourteen or fifteen days.

When I left Philadelphia on the ninth of November, 1895, I had no knowledge that I was going to have an unusual incident on that voyage. I expected to go direct. John D. Hart was not with me when I started. There was not anybody with me except the ordinary crew and excepting the pilot. I did not say I received orders when I got to the Delaware breakwater. I received orders at the wharf here; those orders were in writing. I have not them here. I might find them, but I did not keep them when I left the ship. Those orders were from John D. Hart & Co., and they were in writing. I will produce those orders if I can. Those orders were for me to proceed north after I left the breakwater until I got to Barnegat and there to await further orders. I did proceed from the breakwater and anchored off Barnegat. Then the tug came alongside
55 and put the men and boxes aboard. They brought with them to show their authority another order from John D. Hart & Co.; that was in writing. I do not know whether I can produce that order or not. I will hunt for it. I did not think it was of any consequence. No, sir; I did not think it was of any consequence that my vessel was boarded on the high seas by a tug, by a lot of men with boxes and things; that did not strike me as particularly important. They might be common passengers; that was the first time in my experience in trading between here and Port Antonio when I have been boarded by thirty or forty men and a lot of boxes put aboard; that did not strike me as being unusual. I could not tell whether or not I have that order, but I will hunt for it. I will try to produce it. I am sure I can produce the charter-party, but whether I can produce the order I could not say. As near as I can remember, the writing from J. D. Hart & Company said to take whatever was in the tug, the men and their luggage and boxes, and let them off whenever they called for it to be let off.

By the COURT:

Q. And that did not strike you as an unusual or uncommon thing?

A. No, sir; it did not strike me as anything unusual.

Q. That they should be let off wherever they asked to be let off and take the boats with them; that indicated they were to be let off at sea somewhere, did it not?

A. Yes, sir; it did.

Q. Did it not strike you as unusual that these men were to be taken on board and turned out on the sea with the boats?

A. No; it did not.

By Mr. INGHAM:

56 Q. Have you ever had an experience of that kind before in your whole life as a navigator?

A. Yes; I have had it on the coast in Jamaica and Cuba.

Q. Have you ever had an order to receive a number of men and

boxes on the high seas and let them off whenever they wanted to get off?

A. Not boxes, but I have had them on the coast in Jamaica and Cuba, when they got on the boat, and whenever they wanted to be let off I let them off before.

Q. In your whole experience as a navigator before did you ever know of receiving an order from your owner that allowed a number of men on board your vessel on the high seas with a whole lot of boxes and luggage, with an order that you should let them off on the high seas when they asked you?

A. No; I never had such an order as that. I never had such a thing occur to me before.

Q. What did you suppose was their purpose?

A. I supposed it was their purpose to go down to Cuba.

Q. And you supposed these men were going there to assist the Cuban insurgents, did you?

A. Yes, sir; that is what it was, too. These men brought their own provisions. The ship did not nourish them during the time they were there. I did not see any of them drink coffee. I do not know that their coffee was cooked at the galley. I would have known whether they got other provisions on board, because it was my duty to pay for the provisions, and if there was anything given out I would see whether they were short of provisions. There may have been one or two beg of the cook a cup of coffee. I don't know. It was not furnished by the vessel.

I do not know who was the commander of that expedition.
57 I do not know him. A colored gentleman that they called pilot gave me the order to take them aboard and let them off. I could not tell you his name.

After the party came on board I did not see them open any boxes. I do know they were opened. I suppose so, at least. I suppose they took out of those boxes a lot of guns and short swords of this kind (indicating), because they were not opened when they came aboard, and after they were opened, after they came aboard, they had guns in them. The men had belts on. I did not see any cartridges. I did not see them sewing up any cartridges. I saw bags they sewed up. I knew they had a cannon. The one I saw was not a Maxime rapid-firing gun. I did not examine it. I could not say that there is only one size of Maxime guns. I am not that much of an artilleryman. It might have been a Maxime gun for all I know. The men were on deck. A few of them had pistols or revolvers. I do not know and nobody ever told me that the men who had revolvers were the officers of this expedition. I had conversation with some of those men. We talked over different topics. They said they came from the United States; they told me from Boston. They said they were going to Cuba. They did not tell me what they were going to do there; that was not mentioned. They did not tell me what they were going to do with this cannon. I would not have gone into such a conversation.

Q. You knew very well what they were going to do with it, did you not?

A. I had my own thoughts about it.

Q. You knew they were going down there to fight, did you not?

A. No; I did not.

Q. You knew as well as anybody, did you not?

58 A. I did not know; nobody ever told me. I supposed they were going there.

Q. And you thought it would be all right for you to help them get to Cuba and let them fight to free Cuba?

A. I only thought that I did not violate any law by taking those men when I did take them.

Q. You thought that it was a perfectly proper thing for foreigners like yourself from Denmark, employed by an American merchant, to convey a filibustering or military expedition from the United States to Cuba to fight against the King of Spain?

A. You must excuse me. I do not think we were on a filibustering expedition or any military expedition, either; not as I think we were.

Q. What kind of expedition did you think it was if you had forty men with rifles and machetes and a cannon and a lot of ammunition and bullets and revolvers; did you think it was a Sunday-school excursion?

A. It might have been.

Q. You did not know?

A. There were two hundred negroes that I carried over to Africa from Savannah last spring, and there were about 150 of those that carried revolvers; that is the reason I did not think anything strange of it.

Q. Do you not know and did you not know that those men were going there to fight for Cuba?

A. I did not know it.

By the COURT:

Q. Did you believe it?

A. Yes; I believed they were going there.

59

By Mr. INGHAM:

At Barnegat I did not see any men leave the Horsa and go aboard the lighter. John D. Hart did not go down the river with me and get aboard that lighter. The firemen did go to the chief engineer and I overheard the conversation. I did not hear them say they did not want to stay on the ship; they made some complaint of that kind. I told them if anybody had to hang for this I would be the man to hang for it. I told them they had better go below and mind their own business. I do not know whether I mentioned that it would be all right. I only said, "You got nothing to do with it; you better go down and mind your own business." The name of the Horsa was painted out amidships; the copper letters on the back of the ship were not painted over, to my knowledge; it might have occurred without my knowledge. I do not believe that name was

painted again ever since we ran that trip; it is the same shape still; it would have been possible to put black paint over those copper letters, but that would not hide the name. The regular color of the funnel, as long as we were with J. D. Hart & Co., was fellow below, with red above the black on top; when we left Philadelphia it was painted in that way; while we were at sea the colors were changed to red and black, and when we got to Port Antonio it was red and black, and when we got back to Philadelphia it was black, red, and yellow. We did that because it was necessary to paint her; we scraped the funnel and had not time for the yellow; I put on the yellow paint when I first got back.

It is true that when we got off the Cuban coast about six miles I had the lights of the vessel put out. I saw a light in the distance. I could not say what it was, only I know it was a strange light and it was reported to me. I reported myself to the boats that
60 there is a strange light ahead and I did not know what it is; we were towing the boats and were going slow. I was told to cut the boats loose. I cut the boats loose and started ahead at full speed.

I supposed when I left from Philadelphia with the two boats that they were for Mr. Hart's fruit business in Jamaica. The two boats that were brought aboard from the lighter I knew were for the men, and my orders were to deliver those boats to the men. I did lose one of my boats, one of the ship's boats. I lost one at sea in the Gulf stream; it was smashed, damaged. I sold the boat to the men. I told the collector I lost two boats to put him off his guard. I did lose them in a certain way.

By the COURT:

Q. Did you mean to tell him an untruth?

A. No, sir.

Q. Did you mean to deceive him?

A. No, sir.

By Mr. INGHAM:

Q. You did tell him an untruth, did you not?

A. No; I don't see how.

By the COURT:

Q. You told him you lost the two boats?

A. Yes, sir.

Q. Did you mean him to understand that you lost one by selling it to those Cubans?

A. No; that isn't the two boats we are talking about; we are talking about these two boats that I got in Philadelphia.

By Mr. INGHAM:

Q. I was talking about the ship's boats.

A. I understand you. I lost one of them. During that
61 voyage I parted with two boats; one was lost on account of bad weather.

Q. Why did you tell Mr. Murray that you had lost two boats on account of bad weather?

A. I might have told him so, but I don' recollect that myself. I could not swear that I told him so.

Q. Why did you tell him that?

A. I do not know that I did tell him so.

Q. Do you deny that you said it?

A. I don't deny it; no. I can't deny it, because I can't recollect. What answer I gave him I couldn't say.

After we got back to Philadelphia we had no arrangement by which crew was to get a little extra compensation for that trip. We had no arrangement at all. I did not pay twenty-five dollars to one of these men. I do not know that it was paid. I did not get any extra compensation myself. I will swear to that. I do swear that I neither directly or indirectly get a greater compensation than usual on account of this trip of the ninth of November last year.

Re-examined by Mr. KER:

Thal cannon was not fired on board; I must have been sleeping very hard if it was fired, because I slept in the chart-room and the cannon was standing right in front of it. I did not hear it fired.

Trips to Jamaica are not the only trips I have made for J. D. Hart & Co. I have gone to Africa and to Cuba and Savannah and different ports. On the African expedition they had about 150 guns. I have before taken people down to the island of Cuba and landed them, not at a port, but at some other place. It is the custom down in that place, among those islands, for people to

62 come in boats on the vessel and to pile their goods on the vessel; they might pay the agent for it; they did not pay me anything; they go in that way from port to port. I have been into different ports in Cuba and went from there along the coast and picked up fruit along the coast; they are not clearing ports, and when people came on board they were taken to other places on the island; there is nothing unusual or uncommon in it. I supposed those people were going to Cuba to fight; I had no positive knowledge about it. If I had known they were going to Cuba to fight I would have taken them. I am not concealing anything here; I have no cause to conceal anything, and am telling the whole truth.

Recross-examined by Mr. INGHAM:

Q. You said a moment ago that if you had known those men were going to Cuba to fight the Spaniards you would nevertheless have taken them.

A. Of course I would.

Q. You would not have stopped to inquire whether it was against the laws of the United States or not, but you would have taken them anyhow.

A. Yes; I would have taken them. Of course, if I had known I would violate the law by it I would not have taken them.

The charter was not made through J. D. Hart & Company to Emil Nunez; I am sure of that. That charter-party was not made to Nunez or anybody representing the Cuban junta; that is a charter between my owners and J. D. Hart & Company.

Counsel for defendants offer in evidence the machetes identified by the witnesses.

Testimony closed.

63

Defendants' Points.

The learned judge is requested to charge the jury on behalf of the defendants as follows:

1. That it is not a crime or offense against the United States, under the neutrality laws of this country, for individuals to leave this country with intent to enlist in foreign military service, nor is it an offense against the United States to transport persons out of this country and to land them in foreign countries when such persons have an intention to enlist in foreign armies.

2. That it is no offense against the laws of the United States to transport arms, ammunition, and munitions of war from this country to any other foreign country, whether they are to be used in war or not; that in such case the shipper and transporter of the arms, ammunition, and munitions of war only run the risk of the capture and seizure of such arms and contraband of war by the foreign power against whom they are intended to be used; but this does not make it an offense against the laws of the United States, and for such cause the defendants cannot be held guilty.

3. That it is no offense against the laws of the United States to transport persons intending to enlist in foreign armies and arms and munitions of war on the same ship; that in such case the persons transported and the shipper and transporter of the arms run the risk of seizure and capture by the foreign power against whom the arms were to be used and against whom the persons and passengers intended to enlist; but such case did not constitute an offense against the laws of the United States, and for such cause the defendants cannot be found guilty.

4. That the laws of the United States and the section under which the defendants are indicted do not prohibit transporting of arms or of military equipments to a foreign country or forbid one or more individuals, singly or in unarmed association, from leaving the United States for the purpose of joining in any military operations which are being carried on between other countries or between different parties in the same country.

5. That before the jury can find the defendants guilty under this indictment they must first find that there was a "military expedition or enterprise" against the territory of the King of Spain. A military expedition or enterprise does not exist unless there is a military organization of some kind designated as infantry, cavalry,

or artillery, and officered and equipped for active hostile operations.

6. That if the jury find that there were transported on board of the "Horsa" arms and men, but the same were not a "military organizations as infantry, cavalry, or artillery, and officered and equipped, or in readiness to be officered and equipped," then the jury must find the defendants not guilty.

7. That it is not an offense against the laws of the United States for a shipper to ship arms to a foreign country or for volunteers to go to a foreign country for the purpose of joining in military operations which are being carried on between other countries or
65 between different parties in the same country; in such cases the shipper and volunteer would run the risk, the one of capture of his property, and the other of the capture of his person by the foreign power, but the master of the ship transporting such arms and volunteers, not being a military expedition or enterprise, would not commit any offense against the laws of the United States, and would not be liable under this indictment.

8. That if the jury find from the evidence in this case that the officers of the steamship "Horsa" took on board, off the coast of New Jersey, on the high seas, a number of men, all dressed as citizens, without arms and equipments on their persons, and at the same time took on board certain boxes of arms and am-union and manitions of war, but that the said men were not organized as infantry, cavalry, or artillery or ready for such organization, the jury are instructed that they must find the defendants not guilty, even if the jury believe that the passengers on board intended to enlist, on arrival in Cuba, in the Cuban army.

9. That if the jury find from the evidence that the defendants took on board their vessel, off the New Jersey coast, a number of men, unarmed and not organized, either as infantry, cavalry, or artillery, and at the same time took on board boxes of am-union and arms, the jury are instructed that they must find the defendants not guilty, even if the jury should believe that the men intended upon arrival in Cuba to enlist in the Cuban army, and that the boxes of arms were intended for use in the Cuban army.

10. That even if the jury do find that the men taken on board were an organized military force with officers, as infantry,
66 cavalry, or artillery, the jury cannot find the defendants guilty unless the jury also find that the defendants knew that they were such a military organization as infantry, cavalry, or artillery, constituting a military expedition or enterprise against the Kingdom of Spain.

11. That if the jury find from the evidence that the passengers and boxes of arms did not constitute a military expedition or enterprise, but that the said passengers were simply going to Cuba to enlist in either army and the said arms and ammunition were being conveyed to Cuba to be used by either army, then the jury are instructed that the defendants in transporting them in due course of their business committed no offense against the laws of the United States, and the jury are further instructed that all evidence of secrecy,

such as taking on the passengers and boxes of arms on the high seas and putting out the lights off the coast of Cuba, were acts which the defendants might lawfully do to avoid the capture of the passengers and the capture of the property from off their ship by Spanish men-of-war; but under such circumstances, if the jury find there was no military expedition or enterprise, such acts would not of themselves be evidence of any intent to violate the statute of the United States under which the defendants are indicted.

12. That if the jury find from the evidence that the steamship "Horsa" is a vessel sailing under a foreign flag and the defendants took on board the said steamship, off the coast of New Jersey, on the high seas, a number of men without arms and equipments on their persons and at the same time took on board certain boxes of ammunition and munitions of war, the jury are instructed that they must find the defendants not guilty, even if the jury believe that the passengers and arms and ammunition were brought from the United States for the purpose of being transported on board the said steamship, and that the men intended, upon arrival in Cuba, to enlist in the Cuban army, and that the boxes of arms were intended for use in the Cuban army.

13. That it is the duty of the Government to satisfy the jury beyond a reasonable doubt that the men and arms and ammunition taken on board the steamship "Horsa" was a military expedition or enterprise from the United States against the Kingdom of Spain, and also that the defendants knew or shut their eyes to the fact that it was a military expedition or enterprise from the United States against the Kingdom of Spain; and if the jury have from the testimony any reasonable doubt upon either of these questions or facts the jury will find the defendants not guilty.

The 12th point was withdrawn and substitution made as follows:

"If the find that when the defendants left Philadelphia and until after they had passed beyond the jurisdiction of the United States they were ignorant of the fact that they were to transport the men in question, with their arms and provisions, and find that the point off Barnegat where the men in question were taken aboard was beyond the jurisdiction of the United States—in other words, beyond the three-mile limit—and find that the vessel was sailing under a Danish flag, then and in that case they will find the defendants not guilty."

68

Charge of the Court.

GENTLEMEN OF THE JURY: The defendants having been at the time in question officers of the ship Horsa, the first as captain and the others as mates, are indicted jointly and separately, in which indictment it is charged that within the territory and jurisdiction of the United States they did organize and set on foot and provide and prepare the means for a certain military expedition and enterprise to be carried on from thence against the territory and dominions of a foreign prince, to wit, the island of Cuba, the said island of Cuba being then and there the territory and dominions of the King

of Spain, the said United States being at peace with the said King, contrary to the act of Congress in such case made and provided.

The evidence heard would not justify a conviction of anything more than providing the means for or aiding such military expedition by furnishing transportation for the men, their arms, baggage, &c. To convict them you must be fully satisfied by the evidence that a military expedition was organized in this country to be carried out as and with the object charged in the indictment, and that the defendants, with knowledge of this, provided means for its assistance and assisted it as before stated.

Thus you observe the case presents two questions: First, was such military expedition organized here in the United States? Secondly, did the defendants render the assistance stated here with knowledge of the facts.

69 In passing on the first question it is necessary to understand what constitutes a military expedition within the meaning of the statute. For the purposes of this case it is sufficient to say that any combination of men organized here to go to Cuba to make war upon its government, provided with arms and ammunition, we being at peace with Cuba, constitutes a military expedition. It is not necessary that the men shall be drilled, put in uniforms, or prepared for efficient service, nor that they shall have been organized as or according to the tactics or rules which relate to what is known as infantry, artillery, or cavalry. It is sufficient that they shall have combined and organized here to go there and make war on the foreign government, and have provided themselves with the means of doing so. I say provided themselves with the means of doing so because the evidence here shows that the men were so provided. Whether such provision, as by arming, &c., is necessary need not be decided in this case. I will say, however, to counsel that were that question required to be decided I should hold that it is not necessary.

Nor is it important that they intended to make war as an independent body or in connection with others. Where men go without combination and organization to enlist as individuals in a foreign army they do not constitute such military expedition, and the fact that the vessel carrying them might carry arms as merchandize would not be important.

I have said more on this subject than the facts of this case require simply because of the numerous points presented by the defendants, on which the court is asked to charge. These
70 points I will now dispose of. The court is asked to say:

"1. It is not a crime or offense against the United States under the neutrality laws of this country for individuals to leave the country with intent to enlist in foreign military service, nor is it an offense against the United States to transport persons out of this country and to land them in foreign countries when such person has an intent to enlist in foreign armies."

As a general proposition this is true, and the point is affirmed.

"2. It is no offense against the laws of the United States to trans-

port arms, ammunition, and munitions of war from this country to any other foreign country, whether they are to be used in war or not; that in such case the shipper and transporter of the arms, ammunitions, and munitions of war only runs the risk of capture, seizure, &c.

This is also true. No military expedition would exist in such case.

"3. It is no offense against the laws of the United States to transport persons intending to enlist in foreign armies and munitions of war on the same trip; that in such case the persons transported and the shipper and the transporter of the arms and munitions of war only take the risk," &c.

This is true, provided the persons referred to herein had not combined and organized themselves in this country to go to Cuba and there make war on the government. If they had so combined and organized and yet intended when they reached Cuba to
71 join the insurgent army and thus enlist in its service and the arms were taken along for their use, they would constitute a military expedition, as before described, and the transportation of such body of persons from this country for such a purpose would be an offense against the statute.

The fourth, fifth, sixth, seventh, eighth, and ninth points are fully answered by what has been said.

"10. Even if the jury do find that the men taken on board were an organized military force with officers, as infantry, cavalry, or artillery, the jury cannot find the defendants guilty unless the jury also find that the defendants knew that they were such a military organization as infantry, cavalry, or artillery, constituting a military expedition or enterprise against the Kingdom of Spain."

As before stated, to justify conviction of the defendants the jury must be fully satisfied that the defendants knew that the men constituted a military expedition such as I have described.

The eleventh point has been fully answered by what the court has said.

The twelfth point is a very important point and is as follows:

"12. If the jury find that when the defendants left Philadelphia and until after they had passed beyond the jurisdiction of the United States they were ignorant of the fact that they were to transport the men in question with their arms and provisions, and find that the point off Barneget, where the men
72 in question were taken aboard, was beyond the jurisdiction of the United States—in other words, beyond the three-mile limit—and find that the vessel was sailing under a Danish flag, then and in that case they will find the defendants not guilty."

This point raises the question whether the defendants committed an offense against the statute if the only aid which they furnished the expedition was furnished out at sea, beyond the jurisdiction of this country, and I instruct you that if the only aid furnished the vessel, being a foreign vessel, was so beyond our jurisdiction they did not commit an offense, and must consequently be acquitted. They

allege that the point off Barnegat where the men were taken on board was not within three miles of our shore. If this is true and the defendants did not start from our shore under an agreement to provide the means for transporting and to transport the men, but were ignorant of the object of going to Barnegat until they reached there, they cannot be convicted.

If, however, they entered into an arrangement here to furnish and provide the means of transportation, and provided it, they are guilty, if this was a military expedition, although the men were not taken aboard and the transportation did not commence until the ship anchored off Barnegat.

“13. It is the duty of the Government to satisfy the jury beyond a reasonable doubt that the men and arms and ammunition taken aboard the steamship Horsa was a military expedition
73 or enterprise from the United States against the Kingdom of Spain, and also that the defendants knew or shut their eyes to the fact that it was a military expedition or enterprise from the United States against the Kingdom of Spain, and if the jury have from the testimony any reasonable doubt upon either of these questions of fact the jury will find the defendants not guilty.”

This point is affirmed. I trust the jury understand it. To convict the defendants it is necessary that the Government shall have satisfied your minds beyond a reasonable doubt that this was a military enterprise, and that the defendants when they started knew it. Otherwise they are not guilty.

Now, did the men taken on board the Horsa off Barnegat constitute a military expedition? In other words, had they combined, organized and armed themselves to go to Cuba and there make war on its government? A rebellion is, and was at the time, in progress in that country. The evidence justifies the conclusion that the men were principally Cubans. They came on board the vessel in a body and appeared to be acting in concert under an organization or understanding of some description. They were armed, having rifles and cannon, and were provided with ammunition and other supplies. Some of them who were able to speak English declared that they were Cubans going to Cuba to fight the Spanish, and if these men were in combination to do an unlawful act what was said by any of them at the time in carrying out their purpose was evidence against them all as to the nature of the expedition. When the vessel reached the coast of Cuba they lowered boats, which
74 had been taken along on their account and for their use, got into them with their arms, ammunition and other provisions, and left the ship, which had undertaken to tow them some distance further, but was frightened off by the appearance of a light which was supposed to be that of a Spanish man-of-war.

That this was a military expedition designed to make war against the government of Spain would seem to the court to be free from reasonable doubt. The question, however, is one for your determination alone, and I submit it to you as such, reminding you that the responsibility of deciding it rests upon you only.

If you find that this was not a military expedition, or, rather, if you are not fully satisfied that it was, your verdict will be for the defendant- without going further. If, on the other hand, you find that it was a military expedition intended to make war against the government of Cuba, then you must pass upon the second question stated, to wit, Did the defendants, with knowledge of the fact, aid in carrying out its purpose of going to Cuba? They transported the men with their arms, ammunition, and provisions. Did they enter upon this service here with knowledge of the fact that the men constituted a military expedition, to fight against the government of Cuba?

I will not dwell on the evidence relating to this question. It has been very fully stated and commented upon by counsel. You will consider the circumstances under which the defendants started from this port, taking extra boats, clearing for Port Antonio, Jamaica, turning off of their course at the breakwater (at the mouth of the Delaware) going to Barnegat, and there taking a
75 large body of men with arms concealed in boxes, and provisions on board, together with two additional boats under orders to put the men off with their boats, arms, and provisions where they might request. The defendants took them down to the coast of Cuba, extinguishing all lights about the ship as she approached, and there launched the boats and set the men with their arms and provisions adrift to reach the shore somewhere, abandoning the undertaking to tow them further down, and hurrying away because of the appearance of a supposed Spanish man-of-war.

Thus you see what the defendants did. From this and any other testimony bearing on this subject you must determine whether they understood what the expedition and its objects were, and had arranged and provided for its transportation when they left Philadelphia or left our shores within the three-mile limit stated. If they were ignorant on this subject until they anchored off Barnegat light, the point being according to the testimony beyond the jurisdictional limits of the United States, no offense was committed, as I have before stated, against the laws of this country.

The question, therefore, is, Did the defendants understand they were to carry this expedition, and had provided for it and understand what the expedition was before leaving here? As you have seen, they took on two extra boats before starting and cleared for Port Antonio, Jamaica, and turned off of their course at the breakwater (the captain explaining this, to which explanation you will give whatever weight you deem it to be worth). When the
76 men came to the ship off Barnegat there is no evidence that the captain or any one of the defendants expressed or exhibited any surprise. It was then manifest that the services required was to carry men and arms to Cuba (the captain says he then so understood it), a most hazardous undertaking. Is it probable that the defendants would have risked themselves and their ship in this service if they had not been prepared for it by previous arrangement, and have done it without demurring or hesitating?

Again, is it likely that those in charge of the expedition would have risked bringing the men and the property to that point on the mere chance that the defendant would take the risk of carrying them and the property to Cuba without arranging for it beforehand? If the defendants had refused, as it was their right to refuse, and it would seem certain or at least extremely probable that they would refuse this most hazardous service if previous arrangement had not been made, what would have been the situation of the men and the property? The expedition would have failed. The men would have been subject to arrest and the property to sacrifice. Is it probable that those in charge of such an enterprise would take the men and property to this point without having secured certain means of transportation for it in advance? The captain says he was ignorant of the service required of him until he reached the point near Barnegat. You must judge whether he should be believed or not, and from all the evidence must determine whether the defendants left here with knowledge of and provision for what they were about to do.

77 I now submit the case to you, reminding you of its importance. If the evidence of the defendants' guilt is not entirely clear, they should be acquitted. If it is thus clear, they should certainly be convicted. No sympathy or prejudice must be allowed to influence your minds in passing on this case. We have nothing to do with the controversies between the people of Cuba and the government of that island. We are concerned only with the execution of the law in this case. We have only to consider whether the statute to which your attention has been called has been violated. It is our duty to see that the law is honestly and justly executed; that is all. The peace and safety of the community so manifestly depend upon the faithful and honest administration of the law that no man can fail to see it. We are suffering today as probably no other people suffers from lawlessness, from mobs, lynch law, murder, violation of trusts, as the result of want of faithfulness in executing the law.

You will take the case and decide it with a careful regard to the rights of the defendants.

78

Defendants' Exceptions to the Charge.

Counsel for defendants except to that part of the charge of the court giving the definition of a military expedition.

To the refusal of the court to read the points that were not read to the jury.

To the refusal of the court to affirm all the points without qualification.

To the refusal of the court to affirm each point without qualification.

To the statement of the court that in its opinion this was a military expedition.

To the statement of the court that the men were armed.

To the failure of the court to comment on the evidence on behalf of the defendants.

To the statement of the court in reference to the reasons, motives, purposes, and acts of the defendant.

To the statement of the court that the defendants did not express surprise that the men came on the vessel off Barnegat.

To the statement of the court that the declaration of the men on the ship to the witnesses for the Government were evidence against the defendants.

To the statement of the court that even if an agreement to furnish and provide the means of transportation was made within the jurisdiction of the United States to carry on a military expedition which was not consummated until they got outside of the three-mile limit, that constituted an offense against the laws of the United States.

To the statement of the court that the acts and declarations of the Cubans themselves *was* evidence against them all as to the nature of the expedition.

79 And thereupon the counsel for the said defendants did then and there except to the aforesaid charge and opinion of the said court; and inasmuch as the said charge and opinion so excepted to do not appear upon the record, the said counsel for the said defendants did then and there tender this bill of exceptions to the opinion of the said court and requested the seal of the judge aforesaid should be put to the same, according to the form of the statute in such case made and provided; and thereupon the aforesaid judge, at the request of the said counsel for the defendants, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this seventeenth day of March, A. D. 1896.

WM. BUTLER. [SEAL.]

Agreed to.

ELLERY P. INGHAM, *U. S. Attorney.*

And afterwards, on the same day, the defendants aforesaid, by their counsel aforesaid, present for filing an assignment of errors, and the same, being filed among the records of the court here, is in the words and figures following, to wit:

80

Assignments of Error.

1. The court below erred in overruling the objection of the defendants to the testimony of Frederick C. Lee, given in the form of questions and answers, and admitting as evidence the said testimony of the said Frederick C. Lee, who was a witness for the prosecution and who was engineer on the steam-lighter Stranahan, the said testimony being in relation to a conversation on the Stranahan between the witness and two persons who had been taken off the tug Cham by the Stranahan and were being conveyed by the Stranahan to the defendants' ship Horsa, the questions, answers, and testimony being as follows:

Q. Did you have a conversation with some of these young men you took off of the Cham, and they told you they were Cubans?

A. Yes, sir.

Q. Did they tell you where they were going?

(Objected to as to anything that was said or took place on the boat in the absence of the defendants.)

(Objection overruled. Exception by defendants.)

A. Yes; there were two young men in the engine-room there with me, and I asked them where they were going and they told me they were going to Cuba.

2. The court below erred in overruling the objection of the defendants to the testimony of Carl Arnston, a witness for the prosecution, who was a fireman on the defendants' steamer Horsa, the said testimony being in relation to a conversation on the steamer Horsa, after leaving Barnagat and during the course of the voyage, between the witness and one of the persons on board the
81 Horsa, the questions, answers, and testimony being as follows:

Q. Did you have any talk with any of these men?

(Objected to unless it was in the presence of these defendants. Objection overruled. Exception by defendants.)

Q. You say you had a conversation with them?

A. Yes, sir.

Q. Tell us what they told you.

A. I was going in the forecastle one night, and he told us; "I go down to Cuba to fight."

Q. To fight who?

A. The Spanish.

Q. How many men did you talk with?

A. Only one.

3. The court below erred in charging the jury as follows:

"For the purposes of this case it is sufficient to say that any combination of men organized here to go to Cuba to make war upon its government, provided with arms and ammunition, we being at peace with Cuba, constitutes a military expedition. It is not necessary that the men shall be drilled, put in uniform, or prepared for efficient service, nor that they shall have been organized as or according to the tactics or rules which relate to what is known as infantry, artillery, or cavalry. It is sufficient that they shall have combined and organized here to go there and make war on the foreign government and have provided themselves with the means of doing so. I say provided themselves with the means of doing so, because the evidence here shows that the men were so provided. Whether such provision, as by arming, &c., is necessary need not
82 be decided in this case. I will say, however, to counsel that were that question required to be decided I should hold that it is not necessary nor is it important that they intended to make war as an independent body or in connection with others."

4. The court below erred in not reading to the jury all of the defendants' third point and erred in not affirming the said point, the said point being as follows:

"3. That is is no offense against the laws of the United States to

transport persons intending so enlist in foreign armies and arms and munitions of war on the same ship ; that in such case the persons transported and the shipper and transporter of the arms run the risk of seizure and capture by the foreign power against whom the arms were to be used and against whom the persons and passengers intended to enlist ; but such cause did not constitute an offense against the laws of the United States, and for such cause the defendants cannot be found guilty."

The answer to the said point being as follows :

"This is true, provided the persons referred to herein had not combined and organized themselves in this country to go to Cuba and there make war on the government. If they had so combined and organized and yet intended when they reached Cuba to join the insurgent army and thus enlist in it service and the arms were taken along for their use, they would constitute a military expedition, as before described, and the transportation of such body of persons from this country for such a purpose would be an offense against the statute."

5. The court below erred in not reading to the jury and neither affirming -or refusing the defendants' fourth point, which is as follows :

"5. That the laws of the United States and the section under which the defendants are indicted do not prohibit transporting of arms or of military equipments to a foreign country or
83 forbid one or more individuals, singly or in unarmed association, from leaving the United States for the purpose of joining in any military operations which, are being carried on between other countries or between different parties in the same country."

6. The court below erred in not reading to the jury and neither affirming -or refusing the defendants' fifth point, which is as follows :

"5. That before the jury can find the defendants guilty under this indictment they must first find that there was a 'military expedition or enterprise' against the territory of the King of Spain. A military expedition or enterprise does not exist unless there is a military organization of some kind designated as infantry, cavalry, or artillery and officered and equipped for active hostile operations."

7. The court below erred in not reading to the jury and either affirming or refusing the defendants' sixth point, which is as follows :

"That if the jury find that there were transported on board of the Horsa arms and men, but the same were not a military organization, as infantry, cavalry, or artillery, and officered and equipped or in readiness to be officered and equipped, then the jury must find the defendants not guilty."

8. The court below erred in not reading to the jury and either affirming or refusing the defendants seventh point, which is as follows :

"7. That it is not an offense against the laws of the United States

84 for a shipper to ship arms to a foreign country or for volunteers to go to a foreign country for the purpose of joining in military operations which are being carried on between other countries or between different parties in the same country. In such cases the shipper and volunteer would run the risk—the one of capture of his property and the other of the capture of his person—by the foreign power; but the master of the ship transporting such arms and volunteers, not being a military expedition or enterprise, would not commit any offense against the laws of the United States and would not be liable under this indictment.”

9. The court below erred in not reading to the jury and either affirming or refusing the defendants’ eighth point, which is as follows:

“8. That if the jury find from the evidence in this case that the officers of the steamship *Horsa* took on board off the coast of New Jersey on the high seas a number of men all dressed as citizens, without arms and equipments on their persons, and at the same time took on board certain boxes of arms and ammunition and munitions of war, but that the said men were not organized as infantry, cavalry, or artillery or ready for such organization, the jury are instructed that they must find the defendants not guilty, even if the jury believe that the passengers on board intended to enlist, on arrival in Cuba, in the Cuban army.”

10. The court below erred in not reading to the jury and either affirming or refusing the defendants’ ninth point, which is as follows:

85 “9. That if the jury find from the evidence that the defendants took on board their vessel, off the New Jersey coast, a number of men unarmed and not organized either as infantry, cavalry, or artillery, and at the same time took on board boxes of ammunition and arms, the jury are instructed that they must find the defendants not guilty, even if the jury should believe that the men intended upon arrival in Cuba to enlist in the Cuban army, and that the boxes of arms were intended for use in the Cuban army.”

11. The court below erred in charging the jury, in answer to the defendants’ twelfth point, as follows:

“I instruct you that if the only aid furnished the vessel, being a foreign vessel, was so beyond our jurisdiction they did not commit an offense and must consequently be acquitted. They allege that the point off Barnegat, where the men were taken on board, was not within three miles of our shore. If this is true, and the defendants did not start from our shore under an agreement to provide the means for transporting and to transport the men, but were ignorant of the object of going to Barnegat until they reached there, they cannot be convicted. If, however, they entered into an arrangement here to furnish and provide the means of transportation, and provided it, they are guilty, if this was a military expedition, although the men were not taken abroad and the transportation did not commence until the ship anchored off Barnegat.”

12. The court below erred in charging the jury as follows:

"The evidence justifies the conclusion that the men were principally Cubans. They came on board the vessel in a body, and appeared to be acting in concert, under an organization or 85½ understanding of some description. They were armed, having rifles and cannon, and were provided with ammunition and other supplies. Some of them who were able to speak English declared that they were Cubans going to Cuba to fight the Spanish, and if these men were in combination to do an unlawful act, what was said by any of them at the time in carrying out their purpose was evidence against them all as to the nature of the expedition."

13. The court below erred in charging the jury as follows:

"That this was a military expedition, designed to make war against the government of Spain, would seem to the court to be free from reasonable doubt."

14. The court below erred in charging the jury as follows:

"Thus you see what the defendants did. From this and any other testimony bearing on this subject you must determine whether they understood what the expedition and its object were and had arranged and provided for its transportation when they left Philadelphia, or left our shores within the three-mile limit stated. If they were ignorant on this subject until they anchored off Barnegat light, the point being, according to the testimony, beyond the jurisdictional limits of the United States, no offense was committed, as I have before stated, against the laws of this country. The question, therefore, is, Did the defendants understand they were to carry this expedition, and had provided for it, and understand what the expedition was before leaving here? As you have seen, they took on two extra 86 boats before starting, and cleared to Port Antonio, and turned off of their course at the breakwater, the captain explaining this, to which explanation you will give whatever weight you deem it to be worth."

15. The court below erred in charging the jury as follows:

"The captain says he was ignorant of the service required of him until he reached the point near Barnegat. You must judge whether he should be believed or not, and from all the evidence must determine whether the defendants left here with the knowledge of and provision for what they were about to do."

16. The court below erred in charging the jury as follows:

"We are suffering to-day as probably no other people suffers, from lawlessness, from mobs, lynch law, murder, violation of trusts, as the result of want of faithfulness in executing the law."

17. The court below erred in overruling the defendants' motion in arrest of judgment and the reasons therefor, which reasons are as follow:

"1. Because this court has no jurisdiction over these defendants, or to pass or to impose sentence upon these defendants

"2. Because although the indictment charges that these defendants committed an indictable offense within the jurisdiction of this court, yet the uncontradicted testimony shows that the defendants

are subjects of the King of Denmark ; that they were in charge of a Danish vessel ; that the men and boxes were taken on board the said vessel on the high seas, beyond the three-mile limit and beyond the jurisdiction of the courts of the United States of America, and no overt act or offense, as charged in the said indictment, was committed by the defendants, or either of them, within the jurisdiction of this court or any other court in the said United States of America, and therefore this court is without jurisdiction to try these defendants or to impose sentence upon them."

18. The court below erred in overruling the defendants' motion in arrest of judgment.

87 19. The court below erred in passing sentence upon the defendants.

20. The court below erred in sentencing the defendants to confinement in the penitentiary.

CHARLES L. BROWN,
WILLIAM W. KER,

Attorneys for Defendants.

88 And afterwards, to wit, on the eighteenth day—of the year of our Lord 1896, the defendants aforesaid, by their counsel aforesaid, file- among the records of the court here their petition for writ of error, with order of Honorable George Shiras, justice of the Supreme Court of the United States, allowing same and granting supersedeas and stay of proceedings and execution of sentence pending proceedings under writ of error, and the same are in the words and figures following, to wit :

89 In the Supreme Court of the United States.

To the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States :

The petition of J. H. S. Wiborg and Jens P. Petersen and Hans Johansen respectfully represents :

That they were indicted in the district court of the United States for the eastern district of Pennsylvania upon a bill of indictment of February sessions, 1896, No. 29, which said indictment was under section 5286 of the Revised Statutes of the United States, and charged that your petitioners unlawfully provided the means for a military expedition from the United States to the island of Cuba against the government of the King of Spain, with whom the United States is at peace.

That on February 25th, 1896, your petitioners were arraigned upon the said indictment in the said court and pleaded that they were not guilty of the said charge contained in the said indictment, and thereupon a jury was called and empanelled, and your petitioners were tried before the said jury, and on February 25th, 1896. the said jury rendered a verdict of " guilty."

That at the said trial the evidence showed that your petitioners are subjects of the King of Denmark ; that the steamship Horsa was a ship sailing under the Danish flag ; that your petitioner J. H. S.

Wiborg, was the master of the said steamship; that your petitioners, Jens P. Petersen and Hans Johansen, were the mates of the said steamship; that the said steamship was under charter to a firm in Philadelphia; that on November 9th, 1895, your petitioners sailed on the said steamship under the said charter from the port of Philadelphia, bound for the island of Jamaica; that on November 10th, 1895, thirty-nine men and about forty-three boxes and two life-boats were taken on board the said steamship; that the said men and boxes and life-boats were taken on board the said steamship on the high seas, off the coast of New Jersey, and beyond the three mile limit, and were taken on board by order of the charterer of the vessel, and with directions to the master of the vessel to let the men off at any place designated by the bearer of the order; that the said thirty-nine men were without arms or equipments or apparent organization, but it was afterward found that some of the boxes contained arms and ammunition; that the said steamship proceeded on her voyage to Jamaica, carrying the said men and boxes; that on the high seas and a number of miles off the coast of Cuba the said men disembarked from the said steamship on the said boats, taking with them the said boxes and some arms and ammunition that had been taken from some of the said boxes; that when the said men and boxes were taken on board the said steamship your petitioners were acting under orders from the charterer of the vessel and were ignorant that the men and boxes formed a military expedition or intended to form a military expedition: that there was no evidence that the men and boxes were going to Cuba, excepting from conversations held between three of the said men and some of the firemen on the said steamship, in which the men stated they were going to Cuba to fight the Spanish, but the said conversations were not in the presence of your petitioners and were not made known to your petitioners, and were wrongfully admitted as evidence against your petitioners; that the said men and boxes and boats were taken on board the said steamship on the high seas and were carried on the high seas to near the island of Cuba, where the said men disembarked as aforesaid; that the said men and boxes were not within the jurisdiction of the United States or any of the courts thereof, and that there is or was no evidence whatever that the said men and boxes and boats ever went to the island of Cuba or landed upon said island.

That at the said trial the learned judge was requested to charge the jury that the taking on of the said men and boxes was not an offense committed by your petitioners against the laws of the United States, and that the said court was without jurisdiction, but the learned judge charged the jury that the said taking on of the said men and boxes was an offense against the laws of the United States, and that the said court had jurisdiction, and refused to charge the jury upon the law as requested on behalf of your petitioners, and decided that although the said steamship was sailing under the Danish flag, yet the jurisdiction of the said court extended over the said vessel upon the high seas.

That exceptions were taken to the ruling of the court in the admission of the said evidence against your petitioners and to the charge and decision of the learned judge upon the law as aforesaid, and a bill of exceptions has been presented to and signed and sealed by the learned judge and filed of record in the said court.

That a motion for a new trial was made by and on behalf of your petitioners, assigning as reasons therefor the error on the part of the court, in admitting the said testimony, and in the charge of the court to the jury, and in the decision of the court that the
 91 said court had jurisdiction, which motion for a new trial has been argued and the court has refused the same; that at the same time a motion in arrest of judgment was filed by and on behalf of your petitioners, assigning as reasons therefor that the said court was without jurisdiction to try and sentence your petitioners, which motion in arrest of judgment has been argued and has been refused.

That on the 17th day of March, A. D. 1896, your petitioners were sentenced by the said court, the sentence being that your petitioner, J. H. S. Wiborg, shall pay a fine of three hundred dollars and be confined in the penitentiary for the eastern district of Pennsylvania for the term of one year and four months, and that your petitioners, Jens P. Petersen and Hans Johansen, shall each pay a fine of one
 . . . hundred dollars and be confined in the said penitentiary for the period of one year.

That assignments of error have been filed with the clerk of the said district court of the United States in accordance with the rules of the Supreme Court of the United States.

Your petitioners further represent that the said court erred in assuming jurisdiction over your petitioners and the said steamship, and in the admission of evidence aforesaid, and in the charge of the court to the jury as set forth in the said assignments of error, and in sentencing your petitioners to infamous punishment in the said penitentiary.

Wherefor your petitioners pray that a writ of error may be allowed in the premises, directed to the district court of the United States for the eastern district of Pennsylvania, and that a citation be issued, returnable within thirty days, upon the entry of security in whatever sum may be directed; that a supersedeas may be
 92 granted and a stay of execution of proceedings in the court below pending such writ of error or appeal, and that your petitioners be admitted to bail upon giving bonds in such sum as the district judge for the eastern district of Pennsylvania may direct.

And they will ever pray, &c.

J. H. S. WIBORG,
 JENS P. PETERSEN,
 HANS JOHANSEN,

By CHARLES L. BROWN,
 WILLIAM W. KER, *Counsel.*

93 And now, to wit, the 18th day of March, A. D. 1896, the petition of J. H. S. Wiborg and Jens P. Petersen and Hans Johansen, praying for a writ of error to the district court of the

United States for the eastern district of Pennsylvania, having been read and considered, and the rules of this court having been complied with as to the filing with the court below assignments of error, it is ordered that a writ of error be allowed, and that a citation do issue, addressed as prayed for, returnable within thirty days hereafter, upon the entry of security in the sum of \$250; that a super-seedeas be granted and a stay of proceedings and execution of sentence imposed by the court below pending this writ of error, and that the said petitioners, J. H. S. Wiborg and Jens P. Petersen and Hans Johansen, be admitted to bail upon giving bond in such sum as the district judge for the eastern district of Pennsylvania shall direct.

GEORGE SHIRAS, JR.,

Associate Justice of the Supreme Court of the United States.

94 Know all men by these presents that we, J. H. S. Wiborg and Jens P. Peterson and Hans Johansen, as principals, and Robert J. Barr, of Philadelphia, as sureties, are held and firmly bound unto The United States of America in the full and just sum of two hundred and fifty dollars, to be paid to the said United States of America, their certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this seventeenth day of March, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a session of the district court of the United States for the eastern district of Pennsylvania, in the month of February, A. D. 1896, in a suit depending in said court between The United States of America, plaintiff, and the said J. H. S. Wiborg and Jens P. Petersen and Hans Johansen, defendants in a certain bill of indictment of February sessions, 1896, No. 29, upon which issue was joined and a trial had before Hon. William Butler, judge of said court, and a jury called and impanelled in said case, and such proceedings there had that on the 28th day of February, A. D. 1896, a verdict of guilty was rendered against the said defendants, and the said J. H. S. Wiborg was sentenced to pay a fine of three hundred dollars and be imprisoned in the penitentiary for the eastern district of Pennsylvania for fourteen months, and the said Jens P. Petersen and Hans Johansen were each sentenced to pay a fine of one hundred dollars and be imprisoned in said penitentiary for one year, and the said defendants considering that manifest errors have happened in said trial to their great prejudice, having presented their petition for a writ of error to the Honorable George Shiras, Jr., of the Supreme Court, and having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the verdict in the aforesaid suit, and a citation directed to the said clerk of the United States district court for the eastern district of Pennsylvania, citing and admonishing him to return the record, so that it be and appear at a Supreme Court of the United States to be holden at Washington within thirty days:

Now, the condition of the above obligation is such that if the said

J. H. S. Wiborg and Jens P. Petersen and Hans Johansen shall prosecute their writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void ; else to remain in full force and virtue.

J. H. S. WIBORG. [SEAL.]
 JENS P. PETERSEN. [SEAL.]
 HANS JOHANSEN. [SEAL.]
 ROBERT J. BARR. [SEAL.]

Sealed and delivered in presence of, interlined before signing—
 THOS. MARPLE.
 FRANK T. GROGAN.

Approved by—
 GEORGE SHIRAS, JR.,
*Associate Justice of the Supreme Court
 of the United States.*

95 STATE OF PENNSYLVANIA, }
 County of Philadelphia, } ss :

Robert J. Barr, being duly sworn according to law, deposes and says: I am the owner of real estate, consisting of eight houses, situate in the city of Philadelphia, which houses are assessed for taxation at one thousand dollars each and are of great value beyond that sum ; the title to the said houses is in my own name, and they are free from all estates, liens, and encumbrances, and there is no judgment against me.

ROBERT J. BARR.

Sworn to and subscribed before me this 17th day of March, A. D. 1896.

[SEAL.] CHARLES L. BROWN,
*Notary Public for the Commonwealth of Penna.,
 Residing in Philadelphia.*

96 In the District Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES }
 vs. } Indictment. No. 29, Feb'y Sessions, 1896.
 JACOB H. S. WIBORG. }

And now, March 18th, 1896, a writ of error having been allowed in the above case by Honorable George Shiras, Jr., justice of the Supreme Court of the United States, from the judgment of the district court, and it having been ordered that the defendant be released on bail pending the final determination of the proceedings on said writ of error—

It is by this court ordered that upon the execution of a bond, with surety in three thousand dollars, for his appearance upon the determination of the proceedings on the writ of error, that the defend-

ant be forthwith released from imprisonment and discharged from the custody of the warden of the Eastern penitentiary of the Commonwealth of Pennsylvania.

97 Whereupon Robert J. Barr comes and offering himself as bail for the defendant's appearance, and, the district attorney being satisfied with his sufficiency as bail, the clerk is authorized to take the recognizance of the said defendant, Jacob H. S. Wiborg, with the said Robert J. Barr as surety in three thousand dollars for the defendant's appearance upon the determination of the proceedings on the writ of error or within five days thereafter.

And the same day, it appearing that the said bond, with surety, had been executed, the defendant is discharged from present custody under the sentence entered on the 17th March, 1896.

98 In the District Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES }
vs. } Indictment. No. 29, Feb'y Sessions, 1896.
JENS P. PETERSON. }

And now, March 18th, 1896, a writ of error having been allowed in the above case by Honorable George Shiras, Jr., justice of the Supreme Court of the United States, from the judgment of the district court, and it having been ordered that the defendant be released on bail pending the final determination of the proceedings on said writ of error—

It is by this court ordered that upon the execution of a bond, with surety in fifteen hundred dollars for his appearance upon the determination of the proceedings on the writ of error, that the defendant be forthwith released from imprisonment and discharged from the custody of the warden of the Eastern penitentiary of the Commonwealth of Pennsylvania.

99 Whereupon Robert J. Barr comes and offering himself as bail for the defendant's appearance, and, the district attorney being satisfied with his sufficiency as bail, the clerk is authorized to take the recognizance of the said defendant, Jens S. Peterson, with the said Robert J. Barr as surety in fifteen hundred dollars for the defendant's appearance upon the determination of the proceedings on the writ of error or within five days thereafter.

And the same day, it appearing that the said bond, with surety, had been executed, the defendant is discharged from present custody under the sentence entered on the 17th March, 1896.

100 In the District Court of the United States for the Eastern District of Pennsylvania.

THE UNITED STATES }
vs. } Indictment. No. 29, Feb'y Sessions, 1896.
HANS JOHANSEN. }

And now, March 18th, 1896, a writ of error having been allowed in the above case by Honorable George Shiras, Jr., justice of the

Supreme Court of the United States, from the judgment of the district court, and it having been ordered that the defendant be released on bail pending the final determination of the proceedings on said writ of error—

It is by this court ordered that upon the execution of a bond, with surety in fifteen hundred dollars for his appearance upon the determination of the proceedings on the writ of error, that the defendant be forthwith released from imprisonment and discharged from the custody of the warden of the Eastern penitentiary of the Commonwealth of Pennsylvania.

Whereupon Robert J. Barr comes and offering himself as
101 bail for the defendant's appearance, and, the district attorney being satisfied with his sufficiency as bail, the clerk is authorized to take the recognizance of the said defendant, Hans Johansen, with the said Robert J. Barr as surety in fifteen hundred dollars for the defendant's appearance upon the determination of the proceedings on the writ of error or within five days thereafter.

And the same day, it appearing that the said bond, with surety, had been executed, the defendant is discharged from present custody under the sentence entered on the 17th March, 1896.

102 UNITED STATES, } ss :
Eastern District of Pennsylvania,

We, Jacob H. S. Wiborg, residing — Copenhagen, Denmark, and Robert J. Barr, residing — No. 4241 Main street, Manayunk, in the city of Philadelphia and State of Pennsylvania, acknowledge ourselves to be jointly and severally indebted unto the United States of America in the sum of three thousand dollars, lawful money of the United States of America, to be levied of our goods and chattels, lands and tenements, upon this condition, that if the said Jacob H. S. Wiborg, the defendant, upon whose application a writ of error has been allowed by the Supreme Court of the United States and is now pending, shall be and appear at the district court of the United States for the eastern district of Pennsylvania upon the determination of the proceedings on said writ of error and the receipt and filing of a mandate or other process or certificate showing the disposition thereof by the Supreme Court, or within five days thereafter, to answer and obey whatever final order or judgment shall be made in the premises, and not depart said court without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue.

J. P. H. WIBORG. [L. s.]
ROBT J. BARR. [L. s.]

Taken, acknowledged, and subscribed this 18th day of March, A. D. 1896, in open court.

CHARLES S. LINCOLN,
Clerk District Court.

103 UNITED STATES, } ss:
Eastern District of Pennsylvania,

We, Jens P. Peterson, residing—Aarkus, Denmark, & Robert J. Barr, residing—No. 4241 Main street, Manayunk, in the city of Philadelphia and State of Pennsylvania, acknowledge ourselves to be jointly and severally indebted unto the United States of America in the sum of fifteen hundred dollars, lawful money of the United States of America, to be levied of our goods and chattels, lands and tenements, upon this condition, that if the said Jens P. Petersen, the defendant, upon whose application a writ of error has been allowed by the Supreme Court of the United States and is now pending, shall be and appear at the district court of the United States for the eastern district of Pennsylvania upon the determination of the proceedings on said writ of error and the receipt and filing of a mandate or other process or certificate showing the disposition thereof by the Supreme Court, or within five days thereafter, to answer and obey whatever final order or judgment shall be made in the premises, and not depart said court without leave thereof, then this recognizance to be void ; otherwise to remain in full force and virtue.

J. P. PETERSON. [L. s.]
 ROBT J. BARR. [L. s.]

Taken, acknowledged, and subscribed this 18th day of March, A. D. 1896, in open court.

CHARLES S. LINCOLN,
Clerk District Court.

104 UNITED STATES, } ss:
Eastern District of Pennsylvania,

We, Hans Johansen, residing — Bergen, Norway, and Robert J. Barr, residing — No. 4241 Main street, Manayunk, in the city of Philadelphia and State of Pennsylvania, acknowledge ourselves to be jointly and severally indebted unto the United States of America in the sum of fifteen hundred dollars, lawful money of the United States of America, to be levied of our goods and chattels, lands and tenements, upon this condition, that if the said Hans Johansen, the defendant, upon whose application a writ of error has been allowed by the Supreme Court of the United States, and is now pending, shall be and appear at the district court of the United States for the eastern district of Pennsylvania upon the determination of the proceedings on said writ of error and the receipt and filing of a mandate or other process or certificate showing the disposition thereof by the Supreme Court, or within five days thereafter, to answer and obey whatever final order or judgment shall be made in the premises, and not depart said court without leave thereof, then this recognizance to be void ; otherwise to remain in full force and virtue.

H. JOHANSEN. [L. s.]
 ROBT J. BARR. [L. s.]

Taken, acknowledged, and subscribed this 18th day of March, A. D. 1896, in open court.

CHARLES S. LINCOLN,
Clerk District Court.

105 UNITED STATES OF AMERICA, }
Eastern District of Pennsylvania, } *set :*

I, Charles S. Lincoln, clerk of the district court of the United States for the eastern district of Pennsylvania, do hereby certify that the foregoing is a true and faithful copy of the record and proceedings in the said court in a certain criminal cause therein lately depending, to wit, indictment, No. 29, February session, 1896, "The United States of America against J. H. S. Wiborg, Jens P. Petersen, and Hans Johansen," defendants, as full and entire as the same now remain among the records of the said court in my office, with copy of petition for writ of error, of the assignments of errors, and of the bond on writ of error.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said district court, at Philadelphia, this 10th day of April, in the year of our Lord one thousand eight hundred and ninety-six, and in the 120th year of the Independence of the United States.

[SEAL.]

WM. W. CRAIG,
Dep'ty Clerk District Court U. S.

106 UNITED STATES OF AMERICA, *ss :*

To the United States, Greeting :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the eastern district of Pennsylvania, wherein J. H. S. Wiborg, Jens P. Petersen, and Hans Johansen are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States, this 18th day of March, in the year of our Lord one thousand eight hundred and ninety-six.

GEORGE SHIRAS, JR.,

Associate Justice of the Supreme Court of the United States.

106½ [Endorsed:] No. 29. February sess., 1896. Of indictments. District court U. States, eastern district of Penna. The United States vs. J. H. S. Wiborg, Jens. P. Petersen, & Hans Johansen. Indictment. No. 29. Feb'y sess., 1896. Citation on writ of error and acceptance of service. Lodged in the clerk's office March 18th, 1896, at 4 p. m.

Service accepted March 18th, 1896.

ELLERY P. INGHAM, *U. S. Att'y.*

107 UNITED STATES OF AMERICA, ss :

The President of the United States to the honorable the judges of the district court of the United States for the eastern district of Pennsylvania, Greeting :

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, between The United States, plaintiff, J. H. S. Wiborg Jens P. Petersen, and Hans Johansen, defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States. Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of March, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

GEORGE SHIRAS, JR.,

*Associate Justice of the Supreme Court
of the United States.*

108 [Endorsed:] No. 29. February sess., 1896. Of indictments. District court U. States, eastern district of Penna. The United States vs. J. H. S. Wiborg, Jens P. Peterson, & Hans Johansen. Indictment. No. 29. Feb'y sess., 1896. Writ of error from the Supreme Court of the United States. Lodged in the clerk's office March 18th, 1896, at 4 p. m.

[Endorsed:] District court United States, eastern dist. of Penna. The United States vs. J. H. S. Wiborg, Jens P. Petersen, & Hans Johansen. Indictment. No. 29. Feb'y sess., 1896. Transcript of record of the district court, with writ of error & citation.

Endorsed on cover: Case No. 16,276. E. Pennsylvania D. C. U. S. Term No., 986. J. H. S. Wiborg, Jens P. Petersen, and Hans Johansen, plaintiffs in error, vs. The United States. Filed May 1st, 1896.

1 In the Supreme Court of the United States. October Term,
1895.

J. H. S. WIBORG ET AL. }
vs. } No. 986.
THE UNITED STATES. }

Motion of the United States to Advance for Hearing at this Term.

This cause comes here by writ of error to the District Court of the United States for the Eastern District of Pennsylvania.

The plaintiffs in error were convicted below of violating section 5286 of the Revised Statutes of the United States, which is as follows:

"Every person who, within the territory or jurisdiction of the United States, begins or sets on foot, or provides or prepares the means for any military expedition or enterprise to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district or people with whom the United States are at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars and imprisoned not more than three years."

The writ of error in this cause was allowed by Mr. Justice Shiras, and originally returnable on April 18, 1896, but on application of the plaintiffs in error the time was enlarged to and including May 1, 1896, on which day the transcript, appearing to be certified on the tenth day of April, 1896, was filed in the clerk's office and the cause duly docketed.

2 In view of the approaching adjournment of the court for the term and its announcements already made in regard to the hearing of causes, the law officers of the Government would not, under any ordinary circumstances, make application for the advancement and hearing of a cause at this term; but it is confidently submitted that the circumstances and considerations which induce this motion will certainly commend themselves to the court, and remove all question as to the propriety of the application, whatever disposition may be made of it.

The court will take judicial notice of the President's proclamation of June 12, 1895, but it may be convenient to here recite the portions of it bearing upon the matter involved in this cause:

"Whereas the Island of Cuba is now the seat of serious civil disturbances accompanied by armed resistance to the authority of the established Government of Spain, a power with which the United States are and desire to remain on terms of peace and amity; and

"Whereas the laws of the United States prohibit their citizens, as well as all others being within and subject to their jurisdiction,

from taking part in such disturbances adversely to such established Government * * * by setting on foot or providing or preparing the means for military enterprises to be carried on from the United States against the territory of such Government:

"Now, therefore, in recognition of the laws aforesaid, and in discharge of the obligations of the United States towards a friendly power, and as a measure of precaution, and to the end that citizens of the United States and all others within their jurisdiction may be deterred from subjecting themselves to legal forfeitures and penalties,

"I, Grover Cleveland, President of the United States of America, do hereby admonish all such citizens and other persons to abstain from every violation of the laws hereinbefore referred to, and do hereby warn them that all violations of such laws will be rigorously prosecuted; and I do hereby enjoin upon all officers of the United States charged with the execution of said laws the utmost diligence in preventing violations thereof and in bringing to trial and punishment any offenders against the same."

3 During the past summer the Government has had brought to its attention, by proper sworn complaints, many alleged violations of section 5286 of the Revised Statutes, and has instituted various prosecutions, but in no instance, except in the present case, has a conviction resulted, and the constructions of the law announced by the various judges of the United States District Courts have been, since the beginning of the present insurrection in Cuba, as they were before, not in harmony. During the coming recess of this court the Government has every reason to believe that it will be called upon to institute further prosecutions involving the very questions involved in this present cause, and it is of the highest importance to the performance of their duty that the law officers of the Government, and the District Courts of the United States should be advised by the authoritative decision of this court as to what is the law, to the end that, on the one hand there should be no undue interference with the lawful acts of citizens and inhabitants of the United States, and, on the other, that all officers of the United States charged with the execution of the laws may, as enjoined by the President's proclamation, use the utmost diligence in preventing the violations thereof, and in bringing to trial and punishment any offenders against the same.

The Government has undoubtedly the duty of supporting the conviction below in this cause by all proper arguments; but, quite apart from what conclusion this court may reach as to the proper construction of section 5286, or as to any other question properly involved in this cause, the law officers of the government feel bound to earnestly press this motion upon the favorable consideration of the court, and with great deference submit that the presence of this cause in this court, now brought to the attention of the court by this motion, presents even at this late day of the term alike the

4 opportunity and duty of considering and deciding the important matter involved, to the end that the law may be made certain as well for the protection of the citizens and inhabitants as for the guidance of the officers of the United States charged with the execution of the law.

The plaintiffs in error are at large on bail, pending the decision of this court. Notice of this motion has been given to counsel for plaintiffs in error. It is respectfully submitted that the facts and circumstances above stated fully warrant the undersigned in asking the court to set the case down for hearing at this term.

HOLMES CONRAD,
Solicitor General.

1 In the Supreme Court of the United States. October term,
1895.

J. H. S. WIBORG ET AL. }
vs. } No. 986.
THE UNITED STATES. }

*Brief in Opposition to the Motion of the United States to Advance for
Hearing at this Term.*

This cause comes here by writ of error to the district court of the United States for the eastern district of Pennsylvania.

The plaintiffs in error were convicted below of violating section 5286 of the Revised Statutes of the United States, which is as follows:

"Every person who, within the territory or jurisdiction of the United States begins or sets on foot, or provides or prepares the means for any military expedition or enterprise to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district or people with whom the United States are at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars and imprisoned not more than three years."

2 This legislation embodies a portion of our neuerality acts and is substantially the same as when first enacted in 1794.

The Court is called upon the first time in its history to construe it.

The case, in view of the present war in Cuba, is one of the gravest consequences, calling for the most careful preparation and the utmost deliberation.

I respectfully submit that in the few remaining weeks of the present term it is impossible either to present this case or consider it with the attention its gravity demands.

Further, that the Government fails to show sufficient reason why the case should be so speedily heard that the Court should forego its ordinary precautions in cases of importance to insure correctness of conclusion.

It is true that during the war which has been raging in Cuba for over a year there have been many prosecutions under the neutrality laws in the Federal courts; but in all those cases, as stated by the Solicitor General, there has been but one conviction, now under review, and there has not been and cannot be shown any diversity of ruling by the Federal courts except that created by the ruling of the district judge under review. With this single exception the instructions of the various judges have been in favor of the defendants. Surely from such a consensus of opinion the Government can experience no difficulty in guiding their action until the reassembling of the Court.

While, of course, the desires of the Government regarding the advancement of a case should ordinarily have great weight, yet the Court should not depart from its orders and force a hasty hearing on the other side unless great public exigencies justify such a course.

The Government has experienced no difficulty in properly performing its international obligations under the neutrality laws for the hundred years of their existence without any declaration by this Court on the subject now presented.

3 During that time there has seldom been a period without a war, in many of which our citizens have been involved commercially or otherwise. A number of these conflicts had their theater on our own continent and demanded the constant application of our neutrality laws.

The wars of independence in South America, in Mexico, in Texas, engaged the sympathies of our citizens and affected their interests, furnishing a vast amount of authority as to the construction of those laws and the action of our Government thereunder.

Coming down to more recent history, the Cuban war against Spain, which lasted from 1868 to 1878, was the cause of a most rigid enforcement of the neutrality laws by our Government, and a great number of precedents contained in our archives evidence the facility with which the neutrality laws were carried out. These fill many volumes. During this protracted war there was never supposed to be any difficulty in the way of the Government's proper performance of its international obligations.

The Government can hardly plead that they have not sufficient light to guide them, or that any special exigency at this period of our history exists why this Court should now in haste determine what course the Government should pursue.

In the absence of any overruling public necessity, the Court will not fail to give heed to suggestions made in good faith in favor of ample time for preparation and consideration of an important case.

It would be folly to pretend that before the Court adjourns during this month there is such sufficient time, unless, indeed, the case is of the character that it is more important it should be decided than how it should be decided.

The record has only been filed three days ago, and there has been no undue delay in having it returned to this Court.

4 The decision of this Court will be of the most far-reaching consequence.

For the first time it will declare for all time the signification of the most important clauses of our neutrality acts—as to what constitutes a military expedition.

The Court will not fail to perceive, from its familiarity with our international relations, that there is a vast fund of material in the manuscript archives of our Government which shows the construction given to the act by the various distinguished statesmen charged with our foreign intercourse. No conclusion can be safely reached which overlooks this source of information.

The character of the legislation in question, as traced in historical writings, and its legislative development are matters of the greatest importance.

Many of the older authorities are only to be found in books of trials not easy to obtain, while the recent precedents are contained in instructions of the court to the jury in different sections of the country as yet unreported and not in possession of counsel.

I mention these circumstances to your honors in order that the Court may see that if the case should be ordered to be argued at the present term that argument would necessarily be incomplete and an unsatisfactory basis for a decision by this Court.

The defendants do not wish to delay a hearing except for the purpose of securing a proper hearing. They are willing the cause should be advanced and set down for hearing the first day of next term. They submit that they are entitled to the full benefit of their writ of error, which implies ample time and opportunity by the employment to obtain a correction of errors by the appellate court.

Respectfully submitted.

W. HALLETT PHILLIPS,
For Plaintiffs in Error.

1 In the Supreme Court of the United States. October Term,
1895.

J. H. S. WIBORG, JENS P. PETERSEN, and HANS JOHANSEN, Plaintiffs in Error, vs. THE UNITED STATES.	}	No. 986. Advanced.
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Brief of W. Hallett Phillips for Plaintiffs in Error.

The defendants below, citizens of Denmark, were indicted in the district court of the United States for the eastern district of Pennsylvania, under section 5286, of the Revised Statutes, which is as follows:

"Every person who, within the territory or jurisdiction of the United States, begins, or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years."

2 The indictment charges that the defendants,—

"mariners, at the district aforesaid and within the jurisdiction of this court, did, within the territory and jurisdiction of the United States, to wit, at the port of Philadelphia, Pennsylvania, within the district aforesaid, begin, set on foot, and provide and prepare the means for a certain military expedition and enterprise to be carried on from thence against the territory and dominions of a foreign prince, to wit, against the Island of Cuba, the said Island of Cuba being then and there the territory and dominions of the King of Spain, the said United States being then and there at peace with the King of Spain, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America." (R., p. 1.)

The trial was presided over by Judge Butler.

The defendants pleaded not guilty. (R., p. 2.)

There was a conviction by the jury. (R., p. 3.)

A motion in arrest of judgment was filed on the ground that the court was without jurisdiction to pass sentence. This was overruled, as was also a motion for a new trial (R., pp. 3, 4), and the men were sentenced to pay fines and to serve terms in the State penitentiary. (R., p. 7.)

A writ of error was sued out and the defendants admitted to bail. (R., pp. 50-56.)

A bill of exceptions (R., p. 8) brings up for review the errors assigned (R., p. 42) in overruling motion in arrest of judgment, in entering judgment, in refusing instructions requested by the defend-

ants (R., p. 34), in the charge delivered by the court (R., pp. 34-41), and in the admission of certain testimony. (R., pp. 10, 11.)

The material facts of the case are found within a small compass.

3 The defendant Wiborg, a Danish subject, was the master of the Horsa, a Danish vessel, of which the other defendants, Petersen and Johansen, also Danes, were mates.

On November 9, 1895, the Horsa, under charter to a Philadelphia firm, departed from that port for Port Antonio, Jamaica, the master under orders from her charterers to proceed north, near Barnegat, and await further directions.

This he proceeded to do, and the ship stopped off Barnegat light at a point some distance outside of the three-mile limit and beyond the territorial jurisdiction of the United States.

While there, a tug brought out to the vessel thirty-nine passengers and a quantity of cases of freight—some forty-three boxes. At the same time the master received orders from the charterers to take the passengers and freight on board, including *two row-boats*, and to let the men off together with the freight wherever he should be requested.

The men were at the time unarmed, without equipments or apparent organization, military or otherwise.

The vessel after taking the men and freight on board proceeded on her course to Port Antonio.

On her way down, some of the men opened a number of boxes, and produced from them rifles, other arms and ammunition, including a small field cannon.

When about six miles from the coast of Cuba, the passengers disembarked from the steamer, carrying with them in row-boats the boxes which had been laden on the ship, near Barnegat, together with such arms and ammunition as they had unpacked.

4 If we assume that the purpose of the men was to join the Cuban army in the war of liberty now being waged against Spain, and that the munitions were destined for the same cause, the question for determination is whether the offense stated in the indictment was established.

Did the defendants, *within the territory and jurisdiction of the United States*, begin, set on foot, and provide and prepare the *means for a military expedition* and enterprise to be carried on *from thence* against the dominions of a foreign prince?

The Court will perceive there is but a single offense set forth in the indictment in a single count; but section 5286 Revised Statutes provides that any one of the acts mentioned in the indictment should constitute a separate offense. It would seem that every element of the crime alleged should be proven in order to establish the guilt of the accused.

But the court in the beginning of the charge to the jury said:

“ The evidence heard would not justify a conviction of anything

more than providing the means for or aiding such military expedition by furnishing transportation for the men, their arms, baggage, etc." (R., p. 37.)

Treating the case as resting on that part of the charge which the court thought should be considered by the jury—providing and preparing means for a military expedition—two points arise:

First. In view of the facts of this case, what is a military expedition within the meaning of the statute?

Second. The meaning of the words "provide or prepare the means of any military expedition or enterprise to be carried on from thence," etc.

5 Before discussing the charge of the court, we must express our regret, that in a case of so much importance, the district judge who presided at the trial, should not have exhibited that impartiality so characteristic of the administration of justice in the Federal tribunals.

The address of the judge was an undisguised attempt, only too successful, to influence the jury to find the defendants guilty, by unwarranted intimations and by expressions unsupported by evidence.

It is conceded that expressions of a defendant may be admissible as part of the *res gestæ*, but the fact that the defendants did not give any proof, that they did express surprise, and that the absence of such proof is to be considered to their prejudice, is certainly not within this rule. That this statement of the judge tended to influence the minds of the jurors to the prejudice of the plaintiffs in error, seems beyond question.

He says:

"When the men came to the ship off of Barnegat, there is no evidence that the captain or any one of the defendants expressed or exhibited surprise." (R., p. 40.)

The judge concludes his address, by some general observations on the duty of a proper enforcement of law, closing with these words:

"We are suffering today as probably no other people suffers from lawlessness, from mobs, lynch law, murder, violation of trust, as the result of want of faithfulness in executing the law." (R., p. 41.)

To reinforce the suggestion that the jury should find the defendants guilty of a violation of law, the judge informed them—

6 "That this was a military expedition designed to make war against the government of Spain would seem to the court to be free from reasonable doubt. (R., p. 39.)

It is true he proceeded to add that the question was one for the jury. This was after he had in a previous portion of his charge stated:

"That the men were principally Cubans. They came on board the vessel in a body and appeared to be acting in concert under an organization or understanding of some sort. They were armed having

rifles and cannon and were *provided with ammunition and other supplies.*" (R., p. 39.)

After this decision on the most important controverted questions of facts in the case, we do not see that the jury had any function left except to register in the form of a verdict the opinion of the judge. Moreover, the comments of the judge on the inferences to be drawn from the evidence, were all as to the probable guilt of the defendants.

Such a charge, so contrary to the judicial function, so opposed to the relations which should exist between judge and jury, in itself affords sufficient reason why the judgment should be reversed. There was not a fair trial.

Starr vs. U. S. 153, U. S. 614.

Hickory vs. U. S. 160, U. S. 422; 105 U. S. 350.

Adams vs. Roberts, 2 How. 486.

Where a judge so expresses himself as to inferences of facts that the jury may understand him to be stating principles of law, there is sufficient ground for a new trial. (Wharton, Criminal Practice and Procedure, section 798.)

7 Notwithstanding the confident opinion of his Honor below we submit that the record fails to establish a "military expedition" within the language of the statute.

To understand what that expression imports, we must examine the whole legislation, of which the section under consideration forms a part.

We should then trace its history, in order to perceive, the objects, Congress had in view, when it was enacted.

We should consider the construction placed on the language by our courts, the action of our Government in the enforcement of the act, and the signification of the term in the view of writers of authority.

When the construction of the section is made clear, the further question will remain, whether there was any evidence properly submitted to the jury, of a military expedition, inhibited by the law.

The charge of the court, on the law, which was duly excepted to, and is now assigned for error, was as follows:

"For the purposes of this case it is sufficient to say that any combination of men organized here to go to Cuba to make war upon its government, provided with arms and ammunition, we being at peace with Cuba, constitutes a military expedition. It is not necessary that the men shall be drilled, put in uniforms or prepared for efficient service, nor that they shall have been organized as or according to the tactics or rules which relate to what is known as infantry, artillery, or cavalry. It is sufficient that they shall have combined and organized here to go there and make war on the foreign government, and have provided themselves with the means of doing so. I say provided themselves with the means of doing so because the evidence here shows that the men were so provided. Whether such

provision, as by arming, etc., is necessary need not be decided in this case. I will say, however, to counsel that were that question required to be decided, I should hold that it is not necessary, nor is it important that they intended to make war as an independent body or in connection with others." (R., p. 37.)

We have already called attention to the fact, that the judge below further instructed the jury, that the men came on board the vessel in a body *and appeared to be acting in concert under an organization or understanding of some description*, and that they were armed. We pointed out, that this finding of fact, by the judge, was not only improper, as infringing on the prerogative of the jury, but that, in addition, there was no evidence to justify the statement except that the men came on board together. This in itself was no evidence of organization of a military expedition here.

The uncontradicted evidence was at the time of embarkation the men were unarmed.

Passing for the present, from a more particular examination of the charge, we direct the attention of the Court to the law on the subject.

With one or two exceptions, not pertinent to the present case, the provisions of the Revised Statutes on the subject are the same as those contained in the act of June 5, 1794 (1 Stat., 381).

Section 5281, Revised Statutes, prohibits the acceptance of commissions from a foreign power, by citizens of the United States, within our territory, to serve against any sovereign with whom we are at peace.

Section 5282, forbids our citizens from enlisting in foreign service, within the United States.

Section 5283, makes it a crime, to fit out or arm vessels in this country, against a sovereign at peace with the United States.

Section 5284, inhibits the fitting out or arming within the United States, of vessels to cruise against citizens of the United States.

Section 5285, prohibits within the United States, the augmenting of the force of a foreign vessel of war serving against a friendly sovereign.

Section 5286, prescribes penalties for beginning or setting on foot within the United States, or furnishing the means for a military expedition from hence against a friendly sovereign.

Sections 5287-5290, provide for the enforcement of the foregoing sections.

Section 5291, enacts that the provisions set forth shall not be construed to prevent the enlistment of certain foreign citizens in the United States.

The act of June 5, 1794, "An act in addition to an act to punish certain crimes against the United States," (1 Stat., 381), was passed for a term of two years, continued for a further similar term by act

March 2, 1797 (1 Stat., 497), and made perpetual by act April 1800 (2 Stat., 54). On March 3, 1817, (3 Stat., 370), the previous legislation was amended, by adding provision for precautionary bonds from owner of armed ship, and vesting power to detain the vessel. This act was, in the first instance, temporary, but all provisions on the subject, were incorporated in act of April 20, 1838 (3 Stat., 450), which consolidated the previous statutes.

This last act added a provision to cover cases arising out of the civil wars being waged between Spain and South American countries; it forbids fitting out vessels to cruise in the service of any colony, district, or people.

This was intended to apply to unrecognized governments.
 10 An inspection of the sections of the Revised Statutes proves that the term "military expedition" in section 528 is used in contradistinction to the *naval* expedition covered by the other sections; the one including operations on land, the other on the sea. The one expression is used in as large a sense as the other. The English foreign enlistment act (33 and 34 Vict., c. 90, sec. 11) which is taken from our legislation but contains more stringent provisions, includes the words "military or naval expeditions." The clause is as follows:

"If any person within the limits of Her Majesty's dominions and without the license of Her Majesty, prepares or fits out any naval or military expedition against the dominions of any friendly State * * * every person engaged * * * or employed in any capacity in such expedition shall be guilty of an offense against this act."

The previous act is that of 1819. (59 Geo. III, c. 5.)

The evils sought to be remedied by the act of 1794, were those which arose out of the operations in this country of Genet, the Minister from France, in consequence of the European war of 1793.

Genet assumed in behalf of the French government to exercise in this country, the sovereign powers of giving commissions to privateers, of arming vessels of war, of commissioning officers, and levying men to make war from our territories on the enemies of France. (Wheat. Int. Law, sec. 14.)

He endeavored to enlist in this country, a large military
 11 force, with officers commissioned by him, in order to attack Louisiana, then a Spanish possession, and to take New Orleans. Under date of July 5, 1793, Jefferson notes:

"Mr. Genet called on me and read to me very rapidly instructions he had prepared for Michaud, who was going to Kentucky; an address to the inhabitants of Louisiana and another to those of Canada. In these papers it appears that, besides encouraging those inhabitants to insurrection, he speaks of two generals in Kentucky who have proposed to him to go and take New Orleans, if he will furnish the expenses, about £3,000 sterling. He declines advancing it, but promises that sum ultimately for their expenses; proposes that

officers shall be commissioned by himself in Kentucky and Louisiana; that they shall rendezvous out of the territories of the United States—suppose in Louisiana, and there making up a battalion to be called the ——— of inhabitants of Louisiana and Kentucky, and getting what Indians they could, to *undertaking the expedition* against New Orleans, and then Louisiana to be established into an independent State, connected in commerce with France and the United States.” (9 Jefferson’s Works (ed. 1854), p. 150.)

Troops were raised and commissions were sent by Genet to General Clarke to name and commission other officers for a corps of soldiers. French agents were sent to Kentucky to assist. In answer to letter of Jefferson requesting Governor Shelby of Kentucky to prevent the carrying out of the expedition, the Governor answered expressing his doubt whether there existed any law to restrain or punish the alleged offense:

“If it is lawful for one citizen of this State to leave it, it is equally so for any number of them to do it. It is also lawful for men to carry with them any quantity of provisions, arms and ammunition with whatever intent.”

The answer of Edmund Randolph, who had succeeded Jefferson as Secretary of State, was:

“They may, it is true, leave their country; they may take arms and provisions with them; but if these acts be done not on the
12 ground of mere personal liberty *but of being retained in a foreign service* for purposes of enmity against another people, satisfaction will be demanded and the State to which they belong cannot connive at their conduct without hazarding a rupture.”

He spoke of the movement as an unlawful assembly of a military force. (Am. State Pap., 1 For. Rel., 457-’9.)

In the same year, Genet had granted military commissions to officers for the enlistment, training and conducting of a corps of troops to be enlisted and organized in South Carolina, for an expedition to conquer Florida from the Spaniards for France.

Message of President Washington, January 15, 1793, Am. State Papers; 1 For. Rel., 309; 8 Life and Works of John Adams, 515.

Such were the military enterprises from this country, the suppression of which was one of the avowed objects of the act of 1794.

These movements were of such magnitude as to amount to invasions of foreign states: such as when—

Young Octavius, and Mark Antony,
Came down upon us with a mighty power
Bending their expedition tow’rd Philippi.

The Court will contrast “the military expeditions” aimed at by the act, with the case now presented of the transportation of a few Cubans seeking to join their compatriots in arms in their native land, and the conveyance of a small quantity of arms and ammunition.

The position assumed by our Government was that these acts Genet were a palpable violation of the sovereign rights of the United States.

13 Jefferson in a letter to Genet, June 5, 1793 (1 Wait's Papers, p. 81), said :

"The granting of military commissions within the United States by any other authority than their own, is an infringement on the sovereignty."

Prosecutions were instituted of which the Henfield case was one of the first. The theory on which the Government proceeded was that these acts were common-law crimes. We know that this position was soon abandoned, and it thereupon became evident that a statute prohibiting these violations of American sovereignty would have to be passed.

The statute of 1794 framed by Hamilton (see Hamilton's works vol. 5, p. 97) was then passed. It was adopted in Senate by casting vote of Vice-President John Adams. (*Annals Cong.*, M'ch 1 1794, p. 67.)

The framers of the act of 1794 were careful not to limit the activities of a commercial community like ours, nor deprive us the benefits of our situation, as a neutral nation, at a time most of Europe was at war.

In 1793 Mr. Jefferson informed Mr. Hammond, the British minister, that the purchase and exportation of arms in this country by a belligerent was lawful :

"Our citizens have been always free to make, vend, and export arms. It is the constant occupation and livelihood of some of them. To suppress their calling, the only means, perhaps, of their subsistence, because a war exists in foreign and distant countries, in which we have no concern, would scarcely be expected. It would be harsh in principle and impossible in practice. The law of nations, therefore, respecting the rights of those at peace, does not require from them such an internal derangement in their occupations. It is satisfied with the external penalty pronounced by the President's proclamation, that of confiscation of such portion of these arms as shall fall into the hands of the belligerent powers on their way to the ports of their enemies." (3 Jefferson's Works, (ed. 1854), p. 55)

14 It is not surprising that our early policy and legislation contained no inhibition against furnishing arms and other munitions of war to belligerents, or to rebels, who had not yet been accorded the dignity of belligerency. The framers of the act of 1794 had still fresh in their memory the aid afforded us, through the supply of munitions of war obtained in France, during our revolution, although at that time France was neutral. (4 Canning Speeches, p. 155.)

In the Franco-German war of 1870 not only were arms allowed to be freely sold and transported from hence to the belligerents, but

even our Government itself sold a large quantity of them to agents of the German Government.

This action has been approved by the best opinion here and abroad, and has been sustained by reports of committees of Congress. (Snow's Cases of International Law, 459.)

Our Government has always acted in accordance with these views. See Wharton International Law Digest, Sec. 391; and our courts have frequently held that such traffic was perfectly legal.

The *Itata* 49 F. R., 646; 56 F. R., 505.

U. S. *vs.* Trumbull, 48 F. R., 99.

The *Florida*, 4 Benedict, 452.

The *Carandolet*, 37 F. R., 799.

The rule is the same where the belligerency of the party for whose use the material is destined has not been recognized.

11 Opinions Att'y Gen., p. 452.

The *Itata*, *supra*.

The *Florida*, *supra*.

Hendricks *vs.* Gonzales, 67 F. R., 351.

15 This rule is of course limited to the transportation of such arms as are not to be used to constitute the vessel itself a vessel of war.

City of Mexico, 28 F. R. 150.

Mary N. Hogan, 18 F. R. 529.

U. S. *vs.* 214 Boxes of Arms, 20 F. R. 50.

This Court has, however, decided that an armed vessel may be sold to a belligerent, provided the sale be a *bona fide* transaction and no more than the crew necessary to navigate the ship, be placed on board.

Santissima Trinidad, 7 Wheat. 340;

U. S. *vs.* Quincy, 6 Peters, 445.

The *Meteor*, Snow's Cases International Law, 418.

The statute does not provide for the seizure and forfeiture of the vessel or arms, even when they are the means provided for a military expedition. It was with this fact in view that Congress passed the special act of 1838 (5 Stat., 212), which was limited to contiguous countries, by which on probable cause only, such arms, etc., could be seized by the United States.

Nor was it proposed to restrict the personal liberty of individuals to embark their fortunes and risk their lives on the side of struggling nationalities.

We had just emerged ourselves from a war of independence.

We had not forgotten the services of lovers of liberty from other lands, who in time of our peril had tendered us their swords and espoused our cause.

16 Indeed this is a privilege, necessarily arising out of the rights of our citizens to free locomotion and expatriation. This has

been decided in the cases of the *Santissima Trinidad*, 7 Wheaton, 340, and *U. S. vs. Kazinski*, 2 Sprague, 7.

We find that on March 17, 1818 (*Annals of Congress*, 15th Cong., 1st sess., vol. II, p. 1404), in the course of the debate on this statute, Mr. Clay moved to strike out the words which made it penal for a person to "go beyond the limits or jurisdiction of the United States, with the intent to be enlisted or entered" in the service of any foreign prince or state. This motion was carried without count. For a person to engage or retain another to do this, however, is still a crime, as defined by that section.

If it is legal for individuals to leave this country for the purpose of enlisting in a foreign force, it cannot be illegal to transport them. If it is lawful to ship arms and lawful to ship these men, the mere fact that they go on the same steamer cannot bring them within the purview of the statute.

During the Franco-Prussian war two large ships, the *Ville de Paris* and the *Lafayette*, departed from New York conveying 1,200 Frenchmen together with an enormous amount of munitions of war, the avowed destination of men and arms being the French army, then seeking to repel the German invasion of France.

Secretary Fish refused to consider this as a transportation from hence of a military expedition, or as in any way opposed to our laws or our duties. He held that the uncombined elements of an expedition may leave a neutral state in company with one another, provided they are incapable of proximate combination into an organized whole.

See statement of case in Hall's *International Law*, 609.

17 His opinion has met with the approval of the most generally accepted writers on international law. (*Calvo*, *Le Droit Int.*, sec. 2325; *Bluntschli*, sec. 762.)

A report of this matter is to be found in *English Accounts and Papers*, State papers, vol. 71 of 1871, Franco-Prussian war, p. 128, in connection with the "*Lafayette*."

"Sir E. Thornton to Earl Granville.

"WASHINGTON, *September 26, 1870.*

"MY LORD: With reference to my telegram of the 22d instant, in which I reported to your Lordship the shipment of arms and ammunition for France on board the French steamer '*Lafayette*,' which left New York on the 20th instant, I have the honor to inform you that it has been generally said by the newspapers, and even Mr. Fish told me, that there were a much larger number of arms than I have mentioned in that telegram, besides some cannon. From the source, however, whence I obtained the information, I am inclined to think that my report is correct (*i. e.*), 6,000 rifles, 3,000,000 cartridges.

"The *Lafayette* also took between 500 and 600 Frenchmen, who it was generally supposed, were about to join the French army. But

there seems to be no proof that they had been enlisted in the United States or that they were anything more than volunteers, who were going as passengers of their own free will, and without any engagement. It seems, however, that Mr. Roesing, the North German Consul General, made a representation to the authorities with a view to the Lafayette's being prevented from leaving the port, and although this step was unsuccessful, they were induced to go on board and select 86 Frenchmen from among the passengers and arrest them. These were not provided with tickets, but as nothing else could be proved against them, they were immediately discharged, though not in time to regain the steamer, which started with their luggage on board.

"The District Attorney had previously telegraphed to Mr. Fish for instructions and Mr. Roesing to my Prussian colleague, urging that orders should be sent for the detention of the Lafayette.

18 Mr. Fish replied to the District Attorney, that he was to be guided by the neutrality laws of the United States, and that with regard to the ship it could not be alleged that she was intended for hostile purpose against North Germany. As for the arms and ammunition, they were articles of a legitimate commerce, with which the United States would not interfere, although the vessel might run the risk of being detained by the cruisers of North Germany on her voyage to France. Baron Gerolt also called upon Mr. Fish and earnestly urged him to order the detention of the Lafayette, but I understand received a similar answer to that which had previously been given to the District Attorney. Mr. Roesing asserts that he will make it clear to the authorities that the men on board the Lafayette had actually been enlisted in New York, but he has not as yet been able to do so, and he is threatened with an action for damages by the men who were detained.

"I have, &c.,

"(Signed) EDW'D THORNTON."

Lawrence Elements International Law (1895), pp. 507-'8, speaks as follows in connection with this case:

"A point in connection with expeditions was raised in 1870, when a large number of Frenchmen and Germans, resident in the United States, returned to their own country at the outbreak of the Franco-Prussian war, in order to fulfill their obligations of military service. As long as they traveled singly or in small groups as ordinary passengers, no international question could by any possibility arise. But in one case as many as twelve hundred French subjects embarked at New York in two French ships, which carried a cargo of rifles and ammunition. The attention of Mr. Fish, then Secretary of State in President Grant's Cabinet, was called to the matter. He decided that the vessels could not be looked upon as constituting a warlike expedition against Germany; and there can be little doubt that he was right. The Frenchmen were unarmed and unofficered. There was no attempt to submit them to military discipline, and

though it was not denied that they would be enrolled in the fighting forces of their country as soon as they reached its soil, it was held that they did not leave New York in an organized condition. Their warlike uses were too remote for them to be considered as a portion of the combatant forces of France in such a sense that American neutrality was violated by their departure, though they could have been made prisoners on the voyage by German cruisers."

Lawrence, *Elements Int. Law* (1895), pp. 507, 508.

The case of the *Virginius* is of great importance in this connection. It exhibits the enforcement of a similar rule by our Government under circumstances of the greatest gravity. The action of the Spanish authorities, in seizing this American vessel on the high seas in 1873, and putting to death fifty-six persons out of the 155 found aboard, many of whom were American citizens; almost precipitated this country into a war with Spain. The elaborate discussion which ensued between Mr. Fish and the Spanish government, displays his usual careful and conservative views.

The case is important as showing the opinion of our Government as to what constituted a military expedition. After Spain had tendered satisfaction for the murder of our citizens by the Spanish authorities in Cuba, that government made reclamation against the United States, on the ground among others, that the *Virginius* carried from the United States, a military expedition.

The elaborate discussion which ensued between the two governments, and the notes by Secretary Fish sustaining the American claim of exemption, constitute an important portion of our diplomatic history.

The facts in short, as shown by Spain, were that the *Virginius* had been previously engaged in conveying men and munitions of war to aid the then Cuban revolution against Spain. That on the voyage during which she was captured, she took out munitions of war. That a much larger supply of arms and men was placed on her by the assistance of a schooner which met her on the high seas. That when she left New York she had on board a number of Cubans, including some of the principal officers in the Cuban army. That her papers and crew list were false, her manifest did not state her cargo, and the voyage was undertaken under circumstances of the greatest suspicion and concealment. The vessel was said to have been bought by the enemies of Spain, and there was no question that the object of the Cubans on board was to reach Cuba and join the Cuban army.

In his answer to the Spanish claim, Mr. Fish calls the attention of the Spanish minister to a provision of the treaty between the United States and Spain of 1795 under which the right of our citizens to carry contraband of war to the enemies of Spain was recognized, subject to seizure in time of *recognized war*, on the high seas; but the right of seizure was limited to such articles of contraband only

and was not to be extended to persons not in the civil, military, or naval service, of the enemies of Spain. He then calls attention to the order of the captain general of Cuba "to indiscriminately slaughter 'all persons captured in such vessels ('having on board men, arms, and munitions, that can in any manner promote the insurrection in this province'), without regard to their number,'" which he says "could not but shock the sensibilities of all humane persons." And that "he was constrained to object to the execution of the order against citizens of the United States."

He declared that he "was constrained by a due regard to universally recognized principles of international rights and duties to declare, that in the absence of a recognized state of war,

21 it was no offense in the sailing vessels and steamers of the

United States to carry arms and munitions of war for whomsoever it might concern. If a state of war should exist, if Spain should be entitled to the rights of a belligerent, parties concerned in the shipment of arms and military supplies for her enemy would incur the risk of confiscation by her of their goods; but their act would involve no ground of reclamation against their government in behalf of Spain; and consequently no right to invoke the aid of that Government in preventing the perpetration of the act. Such it is believed is the established law of nations, and such the received rule even when the shipment of arms and munitions is made from the territory of the country whose citizens may be the parties engaged in the introduction of these supplies for the use of one of the belligerents."

In regard to the position of the Spanish Minister, that our duty towards Spain required our Government to prevent the *Virginian* from leaving New York, in order to properly enforce our neutral obligations, and that she carried an unlawful expedition, Mr. Fisk called the attention of the Minister, to the principle, that the idea of *neutrality* was inseparable from the idea of a belligerency to which the neutral was not a party; that Spain had not been willing to concede that a state of war existed in Cuba, and therefore the rights and duties of the United States towards Spain, were only to be measured by the rights and duties of one nation towards another, in case an insurrection exists, which does not rise to the dignity of recognized war.

That what our Government may not knowingly permit to be done is defined by our statutes; that the United States, had not left this class of acts to be judged by the common or international law, but had provided by *statute*, which of them should be regarded as criminal and punished accordingly.

22 "But a friendly government violates no duty of good

neighborhood in allowing the free sale of arms and munitions of war to all persons, to insurgents as well as to the regularly constituted authorities; and such arms and munitions, by whichever party purchased, may be carried in its vessels on the high seas,

without liability to question by any other party. In like manner its vessels may freely carry unarmed passengers, even though known to be insurgents, without thereby rendering the government which permits it liable to a charge of violating its international duties. *But if such passengers, on the contrary, should be armed and proceed to the scene of the insurrection as an organized body, which might be capable of levying war, they constitute a hostile expedition which may not be knowingly permitted, without a violation of international obligation.*

"During the late Franco-German war, each party was free to purchase arms and munitions of war in this country, and did so; and Frenchmen whose hearts were with their struggling countrymen at home, or Germans who wished to join the invading armies of Germany, were free to leave the shores of the United States for that purpose, so long as they left as private citizens, *unarmed, and without engagement made in this country to enter the service of a belligerent.* They did thus leave, in vessels of several different nationalities. Neither this Government nor any other neutral government which may have allowed its merchant marine to transport the arms and munitions of war or the passengers to Europe, was guilty of a violation of its duties as a neutral.

"Even recognized war, therefore, cannot oblige neutral nations to contract the right of their citizens to engage in such commerce, which is lawful in time of peace, or to abridge the liberties of persons enjoying the protection of their flag, to such a point as to render illegal either of these proceedings, although in time of actual war the transportation on the high seas of articles known as contraband of war is to be made subject to the right of capture. But in time of peace no vessel of war has the right to capture, or even interfere with, molest, or detain upon the high seas a regularly documented vessel of another power.

"Of what military expedition," Secretary Fish subsequently remarks, "the *Virginius* was to form a part it is difficult to comprehend. The present most intelligent minister from Spain
23 charges that she was to form part of some military expedition, but he has not shown either her capacity or fitness to take part in a military expedition; or that there was at that time any military expedition fitting out, of which she was to form a part, or with which he in any way connects her."

Foreign Relations, 1874, pp. 1181, 1190, 1207, 1213, 1236.

See cases of the *Perit*, p. 1196, and the *Upton*, p. 1204.

Under date of June 9, 1874, Mr. Fish, writing to Mr. Cushing, our minister to Spain, informed him that the President—

"Feels, that the maintenance of good relations with Spain depends upon her adherence to the statements and assurances hitherto given to this Government, respecting the abandonment of the objectionable decrees, and the disavowal and punishment of the assassins,

who, under the guise of the form of trial, shocked the civilized world, by the executions in Santiago de Cuba."

Message of the President, Ex. Doc. H. R. 90, 44th Cong., 1st sess., pp. 45, 56-66.

The judicial precedents are in accordance with the political action of our Government. They declare that all the elements of a military expedition must be united in order to constitute the crime denounced by the statute.

Although until comparatively recently, there has been no attempt on the part of the courts to clearly define what constitutes a military expedition, we find a substantial agreement in the construction of this section.

The first case tried under the act of 1794, arose out of the prosecution of Smith and Ogden, in 1806. (Trial of Smith and Ogden.)

24 This famous prosecution throws little light upon the present controversy. Although there was an acquittal of the defendants, there is no doubt but that a military expedition, in the full sense of the term as used in the statute, was fully established. The case derives its importance not so much from any points adjudicated, as from the political interest with which it was invested. It was sought by the opponents of Mr. Jefferson's administration, to implicate him in the Miranda Expedition, which, in 1806, departed from New York, after having been set on foot and provided with its means, by Ogden and Smith. It was under the command of General Miranda, who was known to aspire to be the Emancipator of South America. Ogden furnished the ship *Leander* for the purpose of the expedition in the city of New York, fitted out as a vessel of war. She was provided with a large armament consisting exclusive of her complement of 17 guns, of thirty cannon, and carried a large number of men, citizens of the United States who had been enlisted here by one of the defendants and who were enrolled in the service of Miranda. They were provided with uniforms and fully armed.

The indictment was separate against each defendant and each indictment was founded on separate counts. That against Smith alleged that he set on foot a military expedition in this country to be carried on against the dominions of Spain in South America. Another count alleged that the defendant was concerned in preparing the expedition by providing the means for carrying it on in this country. The means specified in the indictment were men and money. The allegations as to Ogden were contained also in separate counts. One alleged that he set on foot, in the city of New

25 York a military expedition to be carried on from thence against the dominions of the King of Spain; another stated that Ogden began in the place alleged, such an expedition; a further count stated that he prepared the means for such an expedition, to wit, one ship which is stated to have been armed here

(Charge of Judge Talmadge, Trial of Smith and Ogden, p. 240). The judge charges that "from 180 to 200 men were here engaged in the enterprise; several of them immediately after took military title, and all were submitting to subordination and discipline."

The *Leander* encountered Spanish war vessels before she reached South America. An engagement ensued, the invaders were defeated, and the *Leander* gave up the expedition.

Here was a military expedition complete in all its parts. A regularly enlisted and organized body of soldiers armed and officered as a military force with a definite military object, and conveyed by a vessel armed for war to its destination. The object of the expedition was to surprise Caracas and so effect the independence of what is now known as Venezuela.

President Jefferson and Madison, who was Secretary of State, vehemently denied any participation in this expedition, though they acknowledged they knew that Miranda expected to start a movement, in South America. Some years after the trial, Jefferson, writing to Foranda, the Spanish minister, in speaking of the trial of Smith and Ogden, declared he had no connivance in Miranda's expedition:

"We had no suspicion that he intended to engage men here, but merely to purchase military stores. Against this there was no law, nor consequently any authority for us to interpose obstacles." (5 Jefferson's Works, p. 474.)

26 In the case of *Workman & Kerr* (Wharton, Am. Criminal Law, § 2802, Trial of *Workman & Kerr*), the judge held that the means for a military expedition might be prepared by enlisting men or inducing others to enlist them.

Judge Judson (Wharton Am. Cr. Law, p. 1017) in *U. S. vs. O'Sullivan*, charged:

"Before the jury can convict on this indictment, it must be proved to their satisfaction, that the expedition or enterprise was in its character military, or in other words, it must have been shown by competent proof, that the design, the end, the aim and the purpose of the expedition or enterprise, was some military service, some attack or invasion of another people or country, or state or colony, as a military force. The engagement of men to invade or attack any other people or country by force or strong hand; the designation of officers, the classification and division of the men into regiments, squadrons, battalions or companies; the division of the men into infantry, cavalry, artillery or riflemen; the purchase of vessels or steamboats, military stores, such as powder and ball, for an expedition, give character to the expedition itself, provided there is sufficient proof to satisfy the jury that they are to be used."

Judge Betts, in his opinion in the same case, says in speaking of what constitutes a military expedition, it is important to ascertain "whether men have been secured or employed to carry it." And

further on he calls attention to the fact that it is obvious that men will not be openly enlisted or officers commissioned.

In *Ex parte* Needham, 1 Peters, C. C. 487, foreigners were enlisted or otherwise engaged and came here with military equipments under command of Needham, who, with the title of colonel, exercised authority over and ordered them to appear at a certain place of rendezvous, where they were drilled and exercised.

27 In the Lumsden case, 1 Bond, 5, Judge Leavitt says:

"Probably a previously concerted movement or arrangement would be sufficient to constitute such a *beginning*. And if this was followed up by the designation of a plan for and enlistment or enrollment, it would bring the parties implicated within the section referred to."

In *U. S. vs. Ybanez*, 53 Fed. Rep., 537, the court repeats the language of Judge Judson in the O'Sullivan case.

Judge Wales in *U. S. vs. Pena*, 69 F. R., 983, says:

"A military expedition or enterprise means a military organization designated as infantry, cavalry, or artillery, officered and equipped, or in readiness to be officered and equipped for active hostile operations."

The case of *The U. S. vs. Rand*, 17 Fed. Rep., 142, which was decided by the same judge who presided in the case now before the court, will of course be relied on by the Government. But in that case the men were put in uniform, drilled and prepared for active service, and they actually did attack and capture the town of Mirogoane. It was an organized military force, in every sense of the word.

The late adjudications made since the outbreak of the present conflict in Cuba, involving the enforcement of section 5286, are found in the instructions of the judges to the juries and in preliminary examination.

The most important are—

U. S. vs. Pena, 69 Fed. Rep., 983,
(Preliminary hearing)—

U. S. vs. Hughes, 70 Fed. Rep., 972.

U. S. vs. Hughes (not yet reported).

U. S. vs. Hart (not yet reported).

28 Judge Brawley, in the *Hughes* case, follows the decisions of the *Pena* case and of Secretary Fish, while Judge Brown gives a very learned and exhaustive definition of what constitutes a military expedition. The charges of Judges Brawley and Brown being not yet reported we have had printed for the use of the court.

Foreign authorities are in harmony with American precedents.

One of the most frequently cited is the Saldanha incident. Four vessels carrying Portuguese troops, officers and men, to the number of 652 under the command of General Saldanha who had been the Portuguese constitutional minister of war in 1927, departed from

England, in order to effect a revolution in Portugal. The English government sent a naval force to intercept the landing of the expedition on Portuguese territory, and effected their object by force exercised near a Portuguese harbor. This action excited the public spirit of the day, and was condemned because England, it was claimed, did not have authority to pursue the expedition after it had evaded her territorial jurisdiction.

3 Phillimore Int. Law, III, 291.

Walker, after discussing the American precedents of the French troops and arms transported from this country, to which we have referred, and after observing that our Government acted on this occasion with propriety, since it was universally acknowledged that no military expedition was shown, adds:

"On the other hand, the elements of an expedition may be recognized in a seemingly less dangerous proceeding. The British ministers, for example, however open to criticism may have been. Their method of action were well advised when, in 1827, they conceived it to be their duty to prevent the landing in the Teceira of Count Saldanha and his followers although the members of the party left England entirely unarmed."

This author asks:

"What, however, is a hostile expedition? Such an expedition in general consists of an armed and organized body about to depose the soil in pursuance of a present design to carry on hostilities against the immediate future against a particular government. But the absence of a single feature may change the character of the entire proceeding."

Int. Law, 457.

Calvo, one of the most accurate of modern writers on international law, defines a military expedition as being an armed enterprise against a country:

"Entrepise á main armée contre un pays: l'expédition d'Égypte, l'expédition de Zeres."

Dict. de Droit Int. verbo, Expedition militaire.

Lawrence in his *Elements of International Law*, 507-'8, says:

"What constitutes a warlike expedition?"

"It must go forth with a present purpose of engaging in hostilities; it must be under military or naval command; and it must be organized with a view to proximate acts of war. But it need not be in a position to commence fighting the moment it leaves the shelter of neutral territory; nor is it necessary that its individual members should carry with them the arms they hope soon to use. When a belligerent attempts to organize portions of his combatant forces on neutral soil or in neutral waters, he commits thereby a gross offense against the sovereignty of the neutral government and probably involves it in difficulties with the other belligerent, which suffers in proportion to his success in his unlawful enterprise.

“When a warlike expedition is fitted out on neutral ground against a belligerent, its individual members need not be
 30 armed in order to bring it within the purview of the law, if only they are organized as soldiers and placed under military command.”

The principles we have sought to establish are guides for the interpretation of the statute and establish the correct rule of construction.

Admitting that combination or organization to be necessary to constitute a military expedition, the presence of any aggregation of individuals on the same vessel bound for the same place, with the same object in view, might be claimed to constitute of itself proof of such organization. If this proposition is correct, Mr. Fish was certainly in error, for we see that the Frenchmen on board the *Ville de Paris* and the *Lafayette* had no tickets; the transportation was provided for them, and they must surely all of them, who desired to embark for the purpose of enlisting on the other side, been notified that these steamers would furnish such transportation.

Under the present state of affairs it is impracticable for Cubans, who desire to join their countrymen, to take passage in the regular lines. They must then seek other means of transportation, and it is not unlawful for a number of them to undertake to cover the expense of transportation, or to go in a vessel, carrying arms, to those whom they desire to join.

It will probably be argued in support of the judge's comments on the conduct of the plaintiffs in error, that if secrecy is employed, it is an indication of a mutual understanding or combination sufficient to prove the crime.

It is not to be expected that a blockade runner shall advertise her departure, and Judge Brown in his opinion speaks clearly on this point.

31 The Court said in the *Itata* case “secrecy and deception cannot bring the case within the purview of the statute, if it is not otherwise in it.”

Section 5286 does not provide any punishment for the men who take part in a military expedition, or who constitute the military expedition, for they cannot be said to begin, set on foot, provide or prepare the means for such an expedition. But they are nevertheless punishable in having enlisted. Those who organize them, or prepare or provide the means for their transportation when so organized, are those who are liable under section 5286.

Considering the two sections together, it is still more evident that a military expedition within the meaning of the act, primarily consists of men enlisted, in subordination to officers or leaders.

The statute requires also that this military organization, should be carried thence from the United States.

In this connection the doctrine of the *Rand* case and that of the *Itata* would seem to clash. It should be remembered that in the

Itata case there were cannon on deck which were dismounted before she took on board in Chile soldiers with their arms. If the decision in the Rand case is correct, that the mere shipping of arms from here, to be used by men picked up on foreign soil, constitutes a carrying on from the United States, it is difficult to see why any transportation of arms and munitions of war, for use of a belligerent force is not also a carrying out from the United States of a military expedition. Whether the men to be armed are on the shores of a

32 hostile territory or on other contiguous foreign soil would seem in principle, if Judge Butler is correct, to make no difference, in his construction of the words "carrying on from thence."

Such a construction would put an end to the traffic in arms and ammunition, which as we have seen, has always been held to be lawful by this government.

The organization which we maintain is necessary as the basis of a military expedition, must have been completed within our territory or jurisdiction, otherwise it cannot be said to be carried out from the United States.

This Court laid down this principle in *United States vs. Quin* (*supra*), where it was held that—

"The intention with respect to the employment of the vessel should be formed before she left the United States, and this must be a fixed intention."

This is under section 5283, which prohibits any person from being concerned in the fitting out or arming of any vessel with intent that such vessel shall be used against a friendly power.

As to the proof of knowledge on the part of the plaintiffs in error that this was a military expedition, there is absolutely none, and under any aspect of the case there is certainly not the slightest proof of guilty knowledge or participation of the mates Jens Petersen and Hans Johansen. Under the facts as proven any refusal on their part to proceed on the voyage would have been mutiny.

While the statute is sometimes called the neutrality act, it is an act to punish offenses against the United States by fines, imprisonment and forfeitures, and the act itself defines the precise nature of these offenses. (Hoar, Att'y Gen., 13 Op. Att'y Gen., p. 17)

33 As pointed out by Mr. Fish, it is not correct to speak of neutrality where there is no belligerency. Our Government will only be in a position to prescribe the duties and enforce the rights of a neutral, when it has recognized that a state of public war exists in Cuba as to which it behooves our Government to be neutral. That it has not yet done.

There can be no application of a neutrality law except there be neutrals. The penalties prescribed by the law might be enforced at any time of perfect peace.

Under the section we are considering, until the recognition of this country of the belligerency of the insurgent Cubans, there

nothing to prevent Spain from fitting out and sending a military expedition to Cuba to put down the rebellion, provided, there is no violation of the law as to enlistment.

This penal statute cannot be so construed as to constitute any act as an infamous crime, except such is clearly defined and included in its language.

It is for this Court to determine, whether the facts or circumstances shown by the record in the case at bar, establish a "military expedition," within the meaning of the law.

We think the Court will be unable to distinguish the case from those to which we have adverted. In order to bring it within the definition of a "military expedition" and so establish a crime committed by the defendants, the court below resorted to conjectures and assumptions unsupported by evidence.

The controlling facts are not disputed.

The Cubans and a number of boxes, some of them containing munitions of war, were taken on board the *Horsa* on the high sea and transported to the point from which they were disembarked.

It may be admitted that their destination was the Cuban army and that the intention of the men was to join the Cuban cause and assist in the liberation of their country.

But every fact repels the idea of a "military expedition" to be carried on from hence against the dominion of Spain.

The paucity of the number of the passengers on the *Horsa*, neither sufficient for offensive nor defensive operations, and the entire absence of a military organization in this country, show conclusively that no "military expedition" was started from hence.

The fact which seemed to impress itself upon the mind of the judge below, as evidence to support his conclusion, that there was an organization here of a military expedition, is that the owner came on board of the *Horsa* in a *body* at the same time, accompanied by boxes some of which contained arms; and he relies on statements alleged to have been made by some of the passengers that they intended to go to Cuba and fight the Spaniards.

But such a state of facts does not constitute a "military expedition" nor any evidence of one.

The men had a right, so far as our laws are concerned, to join the Cuban army and to go to Cuba for that purpose, either singly or together. Nor were they forbidden by our laws to convey to such army munitions of war. Nor was the transportation of such men and contraband articles forbidden by the statute.

This the court below partially concedes but qualifies the concession by the statement "provided the persons had not combined and organized themselves in this country to go to Cuba and make war on the government."

The court does not explain what was meant by the words "combined and organized." There was no evidence of any combination among the men previous to their departure.

But might they not have agreed among themselves to go to Cuba together and join the Cuban army without setting on foot a military expedition in this country?

It is apparent that in the use of the word "organized" the court did not mean a "military organization" in the sense in which that word is generally understood.

That the judge had no clear idea of the meaning of the word is apparent from that part of his charge where he says "they came on board the vessel in a body and appeared to be acting in concert under an organization or understanding of some description." (R., p. 39.)

As far as the carriage of the arms is concerned, the court acknowledged it was not a necessary factor to the solution of the question as to a "military expedition."

We do not contend that in order to constitute such an expedition the men should necessarily be drilled, put in uniform or organized according to tactics as infantry, artillery or cavalry. (Charge, R., p. 37.)

But we do maintain that the words "military expedition" must be given the significance they import.

The passengers on the *Horsa* were not armed when they left this country and did not proceed to the scene of the insurrection as an organized body capable of levying war. The statement of the judge that they were armed is a finding of a fact not warranted by any evidence. This statement was reinforced by the remark that
 36 the arms were *concealed* in boxes. The did not constitute a hostile expedition which may not be permitted. They left our soil without engagements made in this country to enter the service of a belligerent. There was no military organization, no authority nor subjection.

If the Court should be of opinion that there was error in the ruling of the judge below on the subject of a military expedition, it would not be necessary ordinarily to decide the further question whether the defendants within the jurisdiction of the United States, provided and prepared the means for a military expedition to be carried on from thence by providing the transportation. But as suggested in the brief of the Government on the motion for advancement, it is desirable to ascertain what is the law which is to govern executive action.

The district judge held that if the defendants started from our jurisdiction under an arrangement or agreement to provide the transportation they should be convicted although the transportation was not actually furnished nor the men taken or board within our jurisdiction.

In order to avoid repetition of argument we will leave the discussion of the other questions of the case to associate counsel.

We submit that the judgment should be reversed, and a new trial ordered.

W. HALLETT PHILLIPS,

For Plaintiffs in Error.

1 *Charge of Judge Brown in United States vs. John D. Hart et al.*
 and Charge of Judge Brawley in United States vs. Hughes.

United States District Court, Southern District of New York.

Before Hon. Addison Brown, J., and a Jury.

UNITED STATES

vs.

JOHN D. HART, SAMUEL HUGHES, BENJAMIN GUERRA, BERNARDO
 BUENO, and LAWRENCE BRABAZON. }

NEW YORK, *April 10, 1896.*

Charge.

BROWN, J.:

GENTLEMEN OF THE JURY: The object of the neutrality laws is
 2 mainly to prevent complications between this Government
 and foreign powers. They were designed to prevent such
 complications by making criminal such acts as tend to em-
 broil us with other nations; and in part, also, to assert, as history
 shows, our own sovereignty over military enlistments attempted to
 be procured on our own soil.

Within five years after the adoption of the Constitution, so long
 ago as 1794, these enactments were found necessary; and the law
 then passed is substantially the same as it exists today. In 1818 it
 was revised by a few changes of words here and there, not affecting
 the section under which this indictment has been framed. In the
 Revised Statutes of the United States adopted in 1874, the same
 provisions were incorporated and are now referred to by sections
 under the latter act.

Section 5282 deals with individual enlistments. Section 5286
 deals with military expeditions. Section 5283 deals with armed
 cruisers, designed to commit hostilities in favor of one foreign
 power as against another foreign power with which we are at peace.
 Section 5282 prohibits any person from enlisting in this country as
 a soldier in the service of any foreign power. It also prohibits any
 person from hiring or retaining any other person to enlist, or to go
 abroad for the purpose of enlisting. But it does not prohibit any
 person, whether citizen or not, from going abroad for the purpose of
 enlisting in a foreign army. By our very legislation on this subject
 therefore, as apparent from this statute, our law permits individuals
 to go to foreign countries to enlist. I consider that important in
 this case, in its bearing upon the construction of section 5286, which
 was a part of the same original act. I say the law as thus framed
 cannot be construed otherwise than as designedly leaving the
 3 field open for all persons within our jurisdiction, whether
 citizens or not, to go to foreign states to enlist in their armies,

if they chose to do so. As this is lawful for one man, so it is lawful for ten men or for twenty or a hundred men. It is a necessary incident to this lawful right, that men may go abroad for this purpose in any way they see fit: either as passengers by a regular steamer, or by chartering a steamer, or in any other manner they choose, either separately or associated; so long as they do not go on a military expedition, nor set on foot a military enterprise, which section 5286 prohibits.

We have, therefore, to consider these two sections together. If a military expedition alone that is prohibited by section 5286. The language of the act is that "every person who within the jurisdiction of the United States begins, or sets on foot, or provides or procures the means for, any military expedition or enterprise to be carried on from thence," that is, from this country, "against a foreign prince," and so on, "shall be guilty of a high misdemeanor." While, therefore, the right of individuals to go abroad for the purpose of enlistment is undoubted, they must not go as a military expedition: they must not form, nor begin, nor set on foot, any military expedition to be carried on from this country, nor furnish or procure means therefor.

These five defendants are indicted under section 5286; and they are now on trial before you on the contention of the Government that they have either set on foot such a military expedition forming a part of it, or that they have provided or procured the means for it. Here the question then is,—and it is the principal question you have to decide—Was this enterprise, in which some 60 men are shown to have embarked on the Bermuda, besides about 40 others who, it is alleged, were designed to embark—was this enterprise designed merely for the transportation of these men peaceably to Cuba, as individuals who wished and intended to enlist in the insurgent army on arrival there, and which it may be, had promised to do so, but without any military organization here, or any intended military organization before enlistment in Cuba, and without any intended employment of military force on reaching the Cuban army; or, on the other hand, was the embarkation of these men on the Bermuda the beginning of a military expedition to be carried on from this country against Spain?

What, then, is a military expedition, as distinguished from non-military transportation of persons for enlistment abroad? The term "expedition" signifies a journey or voyage by a body of men for some definite purpose. There are various kinds of expedition. We have had expeditions of exploration, like Wilkes' expedition, Fremont's expedition, Greely's expedition and Peary's expedition, and so there have been many military expeditions. We speak of Xerxes' expedition into Greece. A military expedition, therefore, is an undertaking by a body of men of a military character. There must be a body, because one or two men cannot constitute an expedition. To fall within the statute, it must be a military expedition

"carried on from this country." A mere lawful intent to enlist abroad cannot give a voyage a military character. The expedition must be military in character, as is admitted; and I cannot conceive how an expedition can be characterized as military, or be deemed to be "carried on" as a military expedition "from
5 this country" within the language of the statute unless it have some at least of the essential elements of a military body when it starts.

The essential elements of a military body are, first, soldiers, as is indicated by the very word "military," derived from *miles*, a soldier. The fundamental idea of a military enterprise or expedition to be "carried on" from this country is that it is undertaken by soldiers or in some military service. Next is the relation of the soldier to the commander. It imports officers, and the duty of military obedience. Next arms; such arms as are appropriate to the enterprise; such as will enable the body to do the military work contemplated. Next, that it shall act as a unit in a military way, *i. e.*, as a body bound together by organization under a definite command. And, finally, a military purpose, a purpose of attack or defense, a hostile purpose.

Now, here was an enterprise of some kind to transport men by the Bermuda,—to take them somewhere. A part went on board. Others, there is strong evidence to show, intended to go on board, but did not, because they were intercepted before they had embarked.

For the present, I will assume that you find that the destination of all these men was the Cuban insurgent army. But if you find that they were designed to be taken there, or that they wished to go there, do you find in this undertaking beyond reasonable doubt any of the essential elements of a military expedition. I do not say that in order to constitute a military expedition to be "carried on from this country" as the statute reads, it must be complete at the start, or possess all the elements of a military body. It is sufficient if

there was a combination by the men for that purpose, with
6 the agreement and the intention of the body that embarks that it should become a military body before reaching the scene of action. Such a combination and agreement, if means for effecting it were provided, followed by embarkation in pursuance of the agreement, would show such a partial execution of the design on our soil, as to bring the case within our statute, as "a military enterprise begun and carried on from the United States."

If, however, the expedition or enterprise was designed only to transport munitions of war as merchandise to Cuba, though for the use of the insurgent army and at the same time to transport a body of men as individuals to Cuba, who wished to enlist there, and that was all, then it was not a military expedition or enterprise under this statute; it would not be so unless the men had first combined or

agreed to act together as a military force, or contemplated the exercise of military force in order to reach the insurgent army. In the case, I should regard it as a military expedition, for the reason that they had prepared for and intended to exercise military force getting to the insurgent army, or landing in Cuba.

The question then for you upon the facts is whether there is sufficient evidence in what has been produced before you, mostly circumstantial, to show beyond reasonable doubt that there did exist the design of making this body of men who were leaving upon the Bermuda, a military force, or whether they contemplated, as a bona fide any military action; or, whether they had already enlisted here the Cuban army. If they had done the latter, if they had enrolled themselves as members of the Cuban army, and had thus become members of that body, agreeing already to act together
7 such, and the transportation of these men was under surveillance and enrollment and agreement, I think that would be setting foot a military expedition here.

Almost all the evidence in the case is indirect. But you must remember that it is natural that this should be so. Inasmuch as it is legal and lawful for men and munitions of war to be transported to the scene of belligerent operations, those who are engaged in it run the risk of capture, of being sunk in the operation; and there is a necessity on their part, while doing an act which is lawful so far as this country is concerned—there is a necessity, I say, that they should protect themselves by every reasonable means against surprise. There is nothing, therefore, out of character in such an expedition, though it be a lawful one here, that it should be secret, or that there should be an air of mystery about it, or that it should be conducted as secretly as possible. It would be the same if it were unlawful. Secrecy and indirection are, therefore, wholly inconclusive circumstances. They are as consistent with a lawful expedition designed to transport men peaceably to Cuba for the simple purpose of enlistment there, as they are with the existence of a hostile expedition. Thus all the circumstances that attend such an enterprise make it difficult for the Government to prove its charge. This is inherent in the nature of the case, because of the necessity that exists even for a lawful expedition, such as I have described, to work in secrecy.

In passing, I may observe in regard to the clearing of the Bermuda for Santa Martha, and the false oath which seems to have been made by the master a few hours before this seizure, that the false oath is equally inconclusive. That is a separate offense, and
8 on trial here; and it was an act evidently done for the same purpose of keeping secret the taking of passengers, and the nature of the intended cargo, in case you find the vessel was destined to carry the arms and men to Cuba. It was an incident therefore, of the same kind as all the other secret means taken

prevent the knowledge of the expedition from reaching the Spanish authorities and thus subjecting the expedition to greater danger.

I shall not go over the various circumstances in the case upon which reliance is placed to lead you to a conviction that there was a military expedition. If I have made myself understood, I think you appreciate sufficiently what the court understands to be a military expedition, as distinguished from a peaceful and a lawful one. I only repeat that while it is not necessary in my judgment that all the elements of a military expedition—soldiers, officers, a military organization, arms and equipments, should exist or be supplied at the time when the vessel sails, it is necessary that there should be a combination for those purposes; that these should have been within the understanding and intent of the parties and that some of these things should be consummated here. The most essential thing would seem to be a combination for some kind of military organization, some enrollment, some enlistment, or some agreement which bound the men to act together as a body for military service. If this agreement existed, other things might be supplied afterwards before the scene of action was reached.

In the present case these men as a body were not armed, as appears to the court, in any such manner as would be effective, nor as would be probable, in case they were designed for military service before they reached Cuba. A few side arms, a pistol and a
9 belt for a few men, or a sword and a belt for a small portion of the men, do not constitute such an arming of a body of men as you would expect in case that body was designed to act as a military force.

A good deal of stress is laid upon the evidence of enrollment. It is for you to judge what interpretation you shall give to the circumstances that have been proved in that regard. I think there is only one witness, Del Villar, and only one piece of evidence in the whole case, that tends to show any military combination. He says that when he first went to Garcia, after a few moments' conversation Garcia said he did not want him. On a second visit, after some five or ten minutes, he finally said he would take him, and that the witness signed a paper with other names upon it, at Garcia's request. When the witness was called on the second day, changing somewhat the testimony which he gave on the first day, he said that other men were there who signed the paper and that the paper was pointed out on the table by the other men who told him to sign it; the first day he said Garcia told him to sign it, and he did so. The first day he said he did not know what the paper was, except that there were two or three leaves containing names after the heading; that he did not know what the heading was, and did not read it. On the last day, he says he recalls that he saw the words in the heading, "Soldiers incorporated in the city of New York for the independence of Cuba;" and that although the heading was in writing, about three inches long on the page, he did not read the

rest of it, and did not try to read it, nor was it read aloud. It is unfortunate that we have nothing more of this heading. It is always dangerous to judge by a small part of written instrument. How can we tell what the other provisions were, what qualifications were placed upon the words quoted, what agreement there was by the men signing it, if there was any agreement? The court was in doubt, for that reason, whether this piece of testimony should be admitted at all. If, however, you interpret the words quoted by what Del Villar says he did by what he understood, and by what he says he expected to do, you would apparently find some qualification of what these words quoted might import. On cross-examination he says that what he expected to do was to go to Cuba to enlist in the Cuban army. If that is correct, it would indicate that he did not understand that he was enlisted in the Cuban army here. Again, from his actions and conduct, and from the way he testifies, there does not seem to have been any understanding on his part that his signature put him under pay. Whether the heading said anything about pay, we do not know. The way he got money from Almazor seems accidental. He speaks of it as if he had not expected it, and as if there was no contract about it. He says that Hernandez, his friend at the san boarding-house, told him that some others were getting money from Almazor, and if he would go there he would get it; that he went there and got \$5 twice before the Hawkins sailed; and that after the Hawkins was lost, and before the expedition on the Bermuda, he got \$5 from Almazor for two or three of the last weeks.

Now it is for you to determine whether there was any enlistment of men for pay; whether what Del Villar says that he did, and what he expected to do, do not indicate rather what was the real purpose of this expedition. He had no conversation, and no agreement, with any others of the men. There seems to be no evidence of any common understanding except such as might be inferred from what he says about this paper, which he says quite a number signed; and the purpose of the paper may be inferred from what he says he did, and expected to do.

Whether there were officers or any relation of soldier and commander, there is almost an entire dearth of evidence. I do not recall any evidence to show that there was any officer whatsoever, not even that Garcia was an officer or was connected with the insurgent army. If there was, you will give it its weight. Del Villar called himself "under the hand" of Almazor. Whether that was anything more than simply looking after certain men who had arranged to go to Cuba, you must judge. Almazor conducted Del Villar and six others to the Hawkins; and in like manner Del Villar took in charge seven men for the purpose of taking them down to the Atlantic basin, where the tug McCaldin Brothers received them on board for the purpose, as you may find, of embar-

ing on the Bermuda. I think there is no other evidence of direction or command than what may be inferred from that. It is for you to say whether that imports any military command, or whether it is anything more than looking after a certain number of men who had signed their names as willing to go to Cuba and keeping track of them and getting them on board the proper vessels to go there when the time came.

In regard to the ammunition which was on board the Stranahan and which never reached the Bermuda, it is for you to draw your inferences, whether that was in fact designed for the Bermuda or not. If it was, then you are to consider whether the evidence indi-

12 cates that it was to be transported peaceably as merchandise to Cuba, possibly for the benefit of the insurgent army; or whether it was for the purpose of aiding in a hostile attack and invasion on the part of this body of men who were to embark on board the Bermuda or as part of a military enterprise. If you find that the circumstances warrant you in believing that the body of men who embarked and of those who intended to embark upon the Bermuda, were designed to constitute, or to act as a military body before they joined the insurgent army, the presence of arms on board the Bermuda, and the furnishing of them in some way would be extremely important. Proper arms would be a necessary adjunct and attendant on any such design on the part of the men embarking, unless they were to obtain arms from some other source; because, as I have said, in the condition in which they embarked they were not prepared, they were not equipped, they were not armed so as to be of any substantial use for military service. It is incredible that an expedition designed for any military service of its own should be sent out without other arms than what they had personally about them, unless a further supply of arms was planned.

On the other hand, if you find that there was no intention or design on the part of this embarking body to act as a military body, or to exercise any military force as a body in getting to Cuba, and if you find that they had not joined the Cuban army here, so as to become incorporated with it, and were not to be transported from here as a part of the insurgent army, then the presence of these munitions of war on the Bermuda would be unimportant.

I must advert briefly to some general rules of law applicable to your consideration of the evidence. I should first say, how-
13 ever, that unless you find these defendants or some of them were a part of the body designed to be a military expedition, you cannot find them guilty unless you find not only that there was a military expedition, but that the defendants had knowledge of it, and assisted it.

The evidence as affecting Mr. Hart is that he was instrumental in the purchase of the Bermuda, ostensibly for the fruit trade, and that she cleared for a fruit port. He furnished some money in payment of the price of her, and Mr. Guerra furnished the larger part.

Both of these men were on the tug that brought Garcia down to the Bermuda. If you find there was a military expedition, their association with Garcia—who, upon the evidence, must have been a chief instrument in planning and arranging it—and their presence with Garcia when he came down to the Bermuda that night, and when Hart went aboard, would be a pretty strong circumstance from which you might infer their acquaintance with his unlawful design, though that would not necessarily follow. I believe there is no other evidence than that single circumstance. It is for you to say whether that is sufficient. Neither Guerra nor Hart seem to have been in any other way identified with this body of men. If it was military in character, Guerra and Hart cannot be convicted unless they understood it; and unless the purchase of this vessel and the use of it for those men and for that purpose was known by them.

Brabazon and Bueno stated to the Government officers their knowledge that there was to be a transportation of men to Cuba for the insurgent army. Further than that I do not understand
 14 the testimony of Mr. Bagg to go upon that point. Bueno designed to enlist there to fight in the Cuban army. Brabazon knew this general purpose.

In regard to all this evidence, how, upon weighing it, you are to act in view of any uncertainties you may feel, is governed by the maxim in criminal cases, that if there is a reasonable doubt on the whole evidence with regard to the guilt of the accused, you must give him the benefit of the doubt. You must be satisfied beyond a reasonable doubt of the guilt of the accused, and of the existence of those facts, and each of them, which you deem essential to the finding of guilt. And as to the various elements of a military expedition to which I have referred, and the intention, if in any of them you think there is such reasonable question as to lead you to a reasonable and substantial doubt, it is your duty to give the defendants the benefit of that doubt. By that is not meant a mere possibility of a different opinion; nor the mere shadow of a doubt. It is to be a doubt based upon a reasonable consideration of all the circumstances, a reasonable and sensible view of the whole situation.

Another point that I should mention in connection with the testimony of Del Villar, and which I have been asked to charge is, that upon his own testimony, if there was a military expedition, he stands in the situation of an accomplice, testifying for the State; and that his evidence given in that character is to be looked upon with suspicion. It may all be true, but you criticise it. You apply tests freely. If you find it corroborated by circumstances which seem to make it probable, you accept it as probably true. In matters where it would seem improbable, if you do not find it corroborated, you should not act upon that alone. The testimony of accomplices, being viewed with suspicion, ought to
 15 find some corroboration. The Government does not intend

to rely, and does not ask a jury to convict defendants upon the mere testimony of accomplices. It is for you to say to what extent you find Del Villar's testimony corroborated: and if you do find it corroborated, then in this case, as in all others, the testimony of an accomplice may be extremely valuable, because it may explain naturally and easily the other evidence so as to enable you to reach an undoubted and rational conclusion. It is for you to say whether Del Villar's testimony is thus corroborated in its essential particulars; and to what extent his own testimony supports the contention that a military expedition was designed on the part of the men who embarked.

I am also requested to charge you, as I do, that the failure of the defendants to testify in this case is in no degree to be imputed against them. They may rely entirely on the ability of the government to make out a case against them; and when they or their counsel consider that no case is made, and they do not go on the stand as witnesses, that circumstance is to be wholly disregarded, and is in no way to be taken to their prejudice. You judge by the testimony given whether the accusation is made out or not. The burden of proof from the beginning is upon the Government, to establish before you the fact of guilt by credible testimony, and beyond reasonable doubt.

MR. IVINS: I have nothing to request. There are one or two parts of your Honor's charge to which we would like to except at the proper time.

THE COURT: Tell me now what the exception is. I may have spoken unguardedly.

16 MR. RUBENS: That part where your Honor says that it will be sufficient if there is a partial execution of intention, and also where you say in your charge that if the design be present of a military expedition partly executed, that then they would be within the statute.

THE COURT: Partly executed here. I think that is my charge—that stamps the expedition as of a military character.

MR. RUBENS: I think there is a slight inaccuracy which your Honor would like to correct in your charge, where you say that Brabazon and Bueno said there was to be a transportation to Cuba.

THE COURT: Didn't they say they were to go to Cuba?

MR. IVINS: The witness states that they stated.

THE COURT: Yes; that is the testimony of Mr. Baggs.

MR. RUBENS: I have only one request to make, and that is that your Honor should instruct the jury that the confessions of any of the defendants are binding only on themselves and not on the others.

THE COURT: Yes; that is so in this case. I will state to you, gentlemen, that the confessions of Bueno and Brabazon are binding upon themselves only, but I do not remember really that these confessions amount to anything more than that the men were going to

Cuba to enlist. Brabazon said they were going to Cuba. Isn't that so, Mr. Hinman? Do you claim anything more?

Mr. HINMAN: Yes; I claim considerably more, but I do not care to go into any discussion now.

Mr. OLCOTT: I think you inadvertently stated what the indictment charged in saying that the defendant "formed a part
17 of, or begun, set on foot," &c. I do not so understand it in reading it. The indictment does not read that they formed a part of it.

The COURT: What is your exception?

Mr. OLCOTT: Your honor used these words, that the defendants "were charged with having formed a part, or begun, set on foot, or provided the means." The indictment does not charge them with having formed a part. The indictment charges them in the words of the statute absolutely, "unlawfully and wilfully beginning, setting on foot, providing the means for;" but it does not say they formed a part. My point is that the defendant Bueno, being a passenger, might be considered from that fact alone, *ipso facto*, as having formed a part, and I do not think your Honor desires to do him the injustice of saying other than what is found in the words of the statute. I maintain that there is a distinction and great differentiation to be made between the words "formed a part of" and "beginning, setting on foot," etc.

The COURT: I think the man who forms a part of an expedition is one of those who sets it on foot.

Mr. OLCOTT: Not necessarily. I except to that part of your Honor's charge.

Mr. HINMAN: I ask your Honor to instruct the jury that the evidence either of enrollment or organization need not necessarily be direct evidence, but may be inferred from the circumstances of the case.

The COURT: Undoubtedly. The question of organization and enrollment and agreement may be inferred from the circumstances if there are such as seem sufficient to the jury to warrant it.

Mr. KOHLER: And in line with that that there could be
18 an enrollment for an expedition alone as distinguished from an enrollment for the Cuban army; and because Del Villar may have said that he intended eventually to join the Cuban army he did not necessarily contradict his statement that he had enrolled himself.

The COURT: Certainly not. I have recognized that all through. There is one other point, Mr. Hinman, these things I omitted to mention. Do you wish me to charge these?

Mr. HINMAN: The first is the only one I care about, and I do not care very much about that. I do not think it is worth your Honor's while.

The COURT: Very well. I will charge these if you wish.

Mr. HINMAN: The first is in reference to the testimony of the

Baggs, and I do not care about that, that their testimony is not the testimony of detectives and the statutes so hold.

The COURT: I should say that there is nothing in the situation or employment or relation of the Messrs. Bagg to this case which casts upon them any discredit or any reason why you should not give their testimony the same credit that you give to any other witness. You judge it as you would the testimony of any other witness. There is nothing to their disparagement.

Mr. RUBENS: There is one other charge that I would request, that as to so much of the evidence as tends to prove guilt, it must be incompatible with innocence——

The COURT: Yes, that is one request I intended to charge but omitted; and to say that in the application of the doctrine that if there is a reasonable doubt the benefit of that doubt must be given to the prisoner. (If you find the circumstances relied on to show guilt are as compatible with the theory of innocence or of an innocent undertaking as with the theory of a prohibited undertaking, it is your duty to find for the defendant. The very fact that the circumstances are compatible with an innocent undertaking make a situation of doubt, and reasonable doubt, the benefit of which you give to the prisoner.)

The jury then retired, and subsequently rendered a verdict of not guilty as to the five defendants.

I hereby certify that the foregoing is a copy of the charge of Hon. Addison Brown, J., in the case of *The United States vs. John D. Hart et al.*

FRANK D. CURTIS,
Stenographer U. S. Circuit Court.

Attest;

[SEAL.] GEO. J. CHAMBERS.

[Charge of Judge Brawley in *U. S. v. Hughes.*]

20 United States District Court, Eastern District of South Carolina.

BRAWLEY, J.:

GENTLEMEN OF THE JURY:—This is an action brought by the United States against Samuel Hughes, and I am requested by the learned counsel for the defendant to give you certain instructions which are as follows:—

1. The jury are instructed that it is not a crime or offense against the United States under the neutrality laws in this country, for individuals to leave this country with intent to enlist in foreign military service. And the jury are further instructed that it is not an offense against the United States to transport persons out of this

country and to land them in foreign countries when such persons have an intention to enlist in foreign armies.

That is the law and I so instruct you.

2. The jury are further instructed that it is no offense against the laws of the United States to transport arms, ammunition and munitions of war from this country to any other foreign country, whether they are to be used in war or not; that in such case the shipper and transporter of the arms, munitions of war, only runs the risk of the seizure of such arms and contraband of war by the foreign power against whom they are intended to be used, but this does not make it an offense against the laws of the United States, and for such cause the defendants cannot be held guilty.

I so instruct you.

21 3. The jury are further instructed that it is no offense against the laws of the United States to transport persons intending to enlist in foreign armies, and arms and munitions of war on the same ship; that in such case the person transported and the shipper and transporter of the arms run the risk of seizure and capture by the foreign power against whom the arms were to be used and against whom the persons and passengers intended to enlist; but such cause did not constitute an offense against the laws of the United States, and for such cause defendant cannot be found guilty.

I so instruct you.

4. The jury are further instructed that the laws of the United States and this section "do not prohibit transporting of arms or of military equipments to a foreign country, or forbid one or more individuals, singly or in unarmed association, from leaving the United States for the purpose of joining in any military operations which are being carried on between different parties in the same country."

I so instruct you.

5. The jury are further instructed that before they can find the defendant guilty under this indictment they must first find that there was "a military expedition or enterprise against the territory of the King of Spain, and that a military expedition or enterprise does not exist unless there is a military organization of some kind."

I so instruct you; the remainder of the instruction asked for, the court declines to give, as the words would be calculated to mislead; the instruction is given with such modifications as may be given when I state the law in my charge.

22 6. The jury are further instructed that if they find that there were transported on board the Laurada arms and men, but the same were not "a military organization as infantry, cavalry, or artillery and officered or in readiness to be officered and equipped," then the jury must find the defendant not guilty.

That instruction is given to you subject to such modifications as will hereinafter appear when I come to charge you.

7. The jury are further instructed that it is not an offense against

the United States for a shipper to ship arms to a foreign country or "for volunteers to go to a foreign country for the purpose of joining in military operations which are being carried on between other countries or between different parties in the same country, in such cases shippers and volunteers would run the risk, the one of capture of his property, and the other of the capture of his person by the foreign power" but the master of the American ship transporting such arms and volunteers, not being a military expedition or enterprise, would not commit any offense against the Government of the United States, and would not be liable under this indictment.

I so instruct you.

8. The jury are further instructed that if they find, from the evidence in this case, that the master of the S. S. Laurada took on board, off the coast of New Jersey, on the high seas, a number of men, all dressed as citizens without arms and equipments on their persons, and at the same time took on board certain boxes of ammunition and munitions of war, but that the said men were not
23 organized as infantry, cavalry or artillery, or ready for such organization, the jury are instructed that they must find the defendant not guilty even if the jury believe that the passengers on board intended to enlist, on arrival in Cuba, in the Cuban army.

I so instruct you subject to such modifications as may be given later.

The jury are further instructed that if they find, from the evidence that the defendant, as charged in the indictment, took on board, off the New Jersey coast, a number of men, unarmed, and not organized, either as infantry, cavalry or artillery, and at the same time took on board boxes of ammunition and arms, the jury are instructed that they must find the defendant not guilty, even, if the jury should believe that the men intended, upon arrival in Cuba to enlist in the Cuban army, and that the boxes of arms were intended for use in the Cuban army.

I give you that instruction to be taken as will be explained hereafter.

9. The jury are instructed that even if they find that the men taken on board were an organized military force with officers, as infantry, cavalry or artillery, the jury cannot find the defendant guilty unless they find also that the defendant, Captain Hughes, knew that they were such military organization, as infantry, cavalry or artillery; constituting a military expedition or enterprise against the Kingdom of Spain.

That is to be taken with such explanations as may be hereafter given.

10. The jury are instructed that if they find, from the evi-
24 dence, that the passengers and boxes of arms did not constitute a military expedition or enterprise, but that the said passengers were simply going to Cuba to enlist in either army, and the said arms and ammunition were being conveyed to Cuba to be

used by either army, then the jury are instructed that the defendant Captain Hughes, in transporting them in the due course of his business has committed no offense against the United States; and the jury are further instructed that all evidence of secrecy, such as taking on passengers and boxes of arms on the high seas, and putting out the lights on the coast of Cuba, were acts which the defendant might lawfully do to avoid the capture of the passengers and the capture of the property from off his ship by Spanish men-of-war; but under such circumstances, if the jury find there was a military expedition or enterprise, such act would not of itself be evidence of any intent to violate the statutes of the United States under which the prisoner is indicted.

I give you that instruction.

11. The jury are further instructed that the Government must satisfy the jury beyond a reasonable doubt of the guilt of the defendant as to the fact that this was "a military expedition or enterprise" and also as to the fact that the defendant knew or had reasonable opportunity to know and wilfully shut his eyes to the fact that this was a military expedition or enterprise against the Kingdom of Spain, and if the jury have from the testimony any reasonable doubt upon either of these questions, the jury will find the defendant not guilty. And the jury are further instructed that there

25 no presumption against the defendant by reason of his not
testifying in this case, and that the Government still has
the burden of proof, and must satisfy the jury of the guilt of
the defendant beyond a reasonable doubt in all material allegations
of the indictment.

I give you that instruction.

Now, gentlemen, the defendant is indicted under section 5286 of the General Statutes, which is in these words:—

"Every person who, within the territory or jurisdiction of the United States, begins, or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district or people, with whom the United States are at peace shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years."

That section makes it a misdemeanor to begin or set on foot, or provide or prepare the means for any military expedition or enterprise. There is no inhibition under this statute against the shipment of arms or other munitions of war, nor are individuals forbidden to leave this country in unarmed associations for the purpose of joining in any military operations in a foreign country; persons who go upon such expeditions incur the risk of capture when they come within the jurisdiction of such foreign power, and arms and munitions so shipped may likewise be seized.

Whether our statutes on this subject provide with sufficient efficacy for the prevention of any acts which might tend to the violation of the obligation of neutrality is not a question for your consideration or my opinion. Under this indictment your duties are limited to the determination of the single question as to whether the defendant has violated the section as charged. As there
 26 is no evidence tending to show that the defendant began or set on foot or was the leader of any expedition or enterprise, your inquiry is confined to a consideration of the other offense denounced and described in this section, to wit, the preparing or providing the means for any military expedition or enterprise.

Now, as it has been conclusively proved and is not denied that a number of men were carried by the defendant on board of his ship, that the means for the transportation of the same were prepared and provided by him, your inquiry is still further narrowed, and the simple question left for your determination is whether this was a military expedition or enterprise.

There is no precise definition given by any recognized authority of what constitutes a military expedition or enterprise. There would be no question that a military company organized, as infantry, artillery or cavalry, with officers, arms and equipments, would constitute such a military force that the transportation of it from within our territory or jurisdiction would come within the prohibition of this statute—the uncombined elements of such force—that is to say, individuals not drilled or organized or capable of being put into a state of efficiency for warlike operations—would not constitute a military expedition within the meaning of this statute, and the transportation of such individuals as passengers would be legitimate commerce, such as our laws permit.

It is for you to decide whether this body of men fall within the first or second class. If the lines which distinguish between the two were clearly marked there would be no difficulty and
 27 nothing to submit to you—the court would instruct you. It is because there is a wide borderland between the two not precisely delimited that a question arises for your solution, and to solve it rightly you must consider carefully all the testimony that you have heard, and I will now state to you so much of the evidence as may help you to a right conclusion. It is for you to determine the credibility of the witnesses—the duty of the court is to determine, and it has determined their competency. You can believe all or a part or none of these witnesses.

Now, proof has been offered to show that on the morning of the 21st of October just off the Jersey coast, the steamship Laurada took aboard certain men, thirty or thirty-five men, from a tug which met her at that point, that she also took aboard at the same time certain boxes and arms and ammunition. Whether those men were armed when they came aboard is a question for your determination. Some of the witnesses say they were, and some say they were not,

some say that some were armed and others not, some of them say all the men had machetes which are described as long knives, some of the witnesses have called them swords. That after taking aboard these men the steamship set sail for the coast of Cuba, the route by which the Laurada would go in making her voyage to Jamaica would naturally and necessarily carry her by the coast of Cuba. What those men did aboard the ship after they got aboard is a question which you have to decide. If they came aboard and were received as ordinary passengers in unarmed association, and were carried simply as passengers and neither before they came aboard or after they came aboard were they organized as a military company, then under the law as given to you the transportation of those men would not be an offense under this statute.

28 But if after they got aboard they took the arms from the boxes and organized into a company or organization, if they were drilled or went through the manual of arms under the leadership or direction of one man or more, if they themselves became a military organization by reason of such coming together and of such drill or instruction, then from that time forth they would be a military organization or enterprise within the meaning of this statute. It is for you to say whether they did go through that process of organization. There is no proof that before they came aboard they had been so organized, and in the absence of that proof you would not be warranted in assuming that they came aboard as a military organization, or that they were received as such. But if after they came aboard, within the knowledge of the captain, who was master of the ship, and could control everything that went on aboard the ship, they were organized and drilled, if they took the arms from the boxes for the purpose of such organization and drill and were themselves put into a state of efficiency for warlike operation, then the enterprise would take on the nature of a military expedition within the meaning of this statute, and it is for you to determine from the testimony in the case whether that is so or not.

Some of the witnesses testified to the constant drilling, some of them testified to occasional drilling, some of them testified to the seeing no drilling at all, some of them say this drilling, or exercise of the manual of arms took place at such a point on the ship that any one passing that way, by the hatch, could see them. Other witnesses testified they passed by the hatch frequently and saw nothing of that kind going on. On that point the court cannot help you to a conclusion, it is entirely for you to say whether or not that thing went on.

29 If you believe from all the circumstances attendant upon the embarkation of these men that they had before that time been organized into a military force, or if you believe that without any previous organization or drilling they came aboard in a body for the purpose of forming while aboard the ship a military organization and that they brought with them such arms and munitions

war as would enable them to organize themselves and to create on board of that ship, and therefore, within the jurisdiction of the United States, a military expedition or enterprise, and if you believe that while aboard the ship they became organized and were drilled or instructed in the manual of arms and were thus made capable of efficient proximate combination into a force prepared for immediate military operations, and if you believe that such a preparation for a military expedition was within the knowledge of the defendant, and that being the master of the ship, he permitted it to be used for such purpose, and that thereafter he transported such a body, providing for the maintenance and comfort of the organization thus formed, and aided in the landing of it near the scene where military operations were to be carried on, then he must be considered as guilty of violating the law under which he is indicted. If however you believe that the defendant, as master of a merchant ship, engaged in legitimate commerce, carried passengers to the Island of Cuba, simply as ordinary passengers, and that boxes of arms and ammunition were carried simply as merchandise, then he would be within his right, for under our laws it is not forbidden to transport either men or munitions of war.

30 And inasmuch as the Government had the right to seize such men and munitions upon their coming within its jurisdiction, which covers the waters within three miles of the coast of Cuba, the secrecy attending the landing would not of itself constitute an offence.

I must remind you, gentlemen, that you are trying this defendant for violating the laws of the United States, that this prosecution is not in the interests of Spain or instituted in furtherance of her plans for the repression of insurrection against her Government. The prosecution is conducted by the officers of your Government and in vindication of your laws, and you are bound by the regard which you have for your country and the reverence you have for its laws to consider the case divested of any feeling or prejudice or sympathy.

If the Government of the United States and our people desire to aid in the political regeneration of oppressed nations there are methods by which that end can be accomplished, but all those considerations lie outside the domain which circumscribes our duties here today.

In so far as the Government of Spain has brought to the attention of our Government this alleged violation of our laws and has offered witnesses to prove the same and has provided for the maintenance of the witnesses, pending the time when this testimony could be properly presented, she has been entirely within her right and the conduct of her officials in that regard is not a subject of just animadversion. When you come to the consideration of the testimony of such witnesses you will naturally and properly consider the fact,

31 which is not denied, that the witnesses have been receiving pay from the Spanish Government, as affecting their credibility, just as it is in all cases the duty of the jury to consider everything in the way of motive, interest or inducement which tends to throw light upon such testimony as to whether they are probably telling the truth or otherwise.

You will give the defendant the benefit of any reasonable doubt that doubt must not arise from desire, but must grow out of the testimony; it must not rest upon the sympathy or wish to relieve him from the consequences of his act if you believe him to be really guilty.

Your verdict may be either not guilty or guilty, or guilty, with recommendation to mercy.

UNITED STATES OF AMERICA, }
Eastern District of South Carolina, }

District Court.

UNITED STATES }
 vs. } Indictment 5286, Rev. Stat. U. S.
 SAMUEL HUGHES. }

Personally appeared Julia C. Courtney and makes oath that she is the official stenographer of the district court of the United States for the eastern district of South Carolina, and that the foregoing nine pages of typewritten matter contain a true and correct copy of the charge to the jury of the Hon. William H. Brawley, United States district judge, presiding, on the 23d day of January, 1896, in the above-entitled cause, as the same was taken by me stenographically at the time, and transcribed from my stenographic notes by me.

JULIA C. COURTNEY.

Sworn to before me this 26th day of February, 1896.

[SEAL.]

ARTHUR BRYAN,
Notary Public for South Carolina.

32 STATE OF SOUTH CAROLINA, }
County of Charleston. } ss.

I, Robert Graham, clerk of the court of common pleas and general sessions, in and for said county (said court being a court of record) do hereby certify that Arthur Bryan, whose name is subscribed to the certificate of proof, or acknowledgment of the annexed instrument, and therein written, was, at the time of taking such proof or acknowledgment, a notary public, of the State of South Carolina, in and for the said county of Charleston, dwelling in said county, cor

missioned and sworn, and duly authorized to take the same. And, further, that I am well acquainted with the handwriting of such notary and verily believe the signature to the said certificate is genuine, and that said instrument is executed and acknowledged according to the laws of the State of South Carolina.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 26th day of February, 1896.

[SEAL.]

ROBERT GRAHAM,

Clerk C. P. & G. S.

Endorsed: United States of America, eastern district of South Carolina. District court. United States *vs.* Samuel Hughes. Rev. Stat., 5286. Charge of court to jury, 23d January, 1896.

1 In the Supreme Court of the United States, October Term, 1895.

J. H. S. WIBORG, JENS P. PETERSEN, and HANS JOHANSEN, Plaintiffs in Error, v. THE UNITED STATES.	}	No. 986.
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In Error to the District Court of the United States for the Eastern District of Pennsylvania.

Brief for Defendant in Error.

A party of filibusters, sailing clandestinely from New York, were received on board the steamer Horsa on the high seas off the New Jersey coast, and effected a safe landing at night on the coast of Cuba. The Horsa had sailed from Philadelphia in concert with the filibustering party. Its captain and mates were indicted therefor under Rev. Stat., § 5286. They were tried before Judge Butler and a jury and convicted, and bring this writ of error.

2 *Statement of Facts.*

It is matter of history, of which the court will take judicial notice, that Cuba is a colony of Spain. It is also a part of the history of the times, and has, indeed, been officially announced in a proclamation by the President of the United States, that there is an insurrection in Cuba against the Spanish Government. This fact is expressly admitted by all the plaintiffs in error; and they admit that it was known to themselves. (Rec., p. 22.)

The Horsa is a Danish steamer and sails under the Danish flag. The defendant Wiborg, captain of the steamer, is a subject of the King of Denmark. The other defendants, also, are claimed by their counsel to be subjects of the King of Denmark; but this fact does not appear of record.

The Horsa sailed from Philadelphia November 9, 1895, between six and seven p. m., bound ostensibly for Port Antonio, Jamaica. It was a vessel engaged in the fruit business for John D. Hart & Co., of Philadelphia, and was bound for a cargo of fruit. It carried very little cargo on sailing. Among the things which it did carry were two boats, which were cleared for Port Antonio (pp. 11, 25).

When the vessel passed the Delaware breakwater, her proper course would be southward. She turned, however, to the northward, went up the Jersey coast to Barnegat light, and anchored in the high seas between three and five miles off from the shore (pp. 9-11). Captain Wiborg in his testimony states that

3 this was due to a message received by him before sailing, "which was, after I passed the breakwater, to proceed north near Barnegat, and wait further orders" (p. 25).

Between ten and twelve on the same evening the steam light J. S. T. Stranahan sailed from Brooklyn, carrying as cargo some cases of goods and two lifeboats, which had been put on board the crew of the lighter during the evening. In the lower bay New York below Staten Island, during the night, she took on board between 30 and 40 passengers, mostly dark-complexioned men speaking a foreign language, apparently Cubans or Spaniards. The lighter then ran down to Barnegat, where she saw a steamer under a white flag. She then also ran up a white flag, went alongside and put aboard her passengers, with the cases of goods and the lifeboats. The steamer which they boarded was the *Horsa* (pp. 8, 19, 25-6).

Captain Wiborg saw the boarding done, and assented. His first men complaining, his answer was according to his own testimony "I told them if anybody had to hang for this, I would be the man to hang for it" (p. 31).

He testifies that a man on the lighter brought him a message from John D. Hart & Company: "He told me to take those men and luggage and whatever they had on board the *Horsa* and let them off whenever they called for it to be let off. I shipped the two boats at the same time, and the order of my message was to deliver those two boats to those men and the two boats that I had shipped here in Philadelphia, * * *

The only order was they had a colored man there that they called the pilot, and whenever he called for them to be let off I should let them off and give them the boats. * * * Deliver them to these men as soon as they called for them" (pp. 25-6). "The pilot did not tell me where he was going. I did talk to him, but he could talk very little English." The captain was informed that the party were going to Cuba, and believed it to be a party bound for the Cuban insurrection, but was careful to ask no questions, and considered his own part in the affair to be legal (pp. 30, 31, 33).

After boarding the *Horsa* the new passengers broke open their boxes which they had brought with them and took out rifles, swords, and machetes, and one cannon. They also had cartridges, belts, medicines, and bandages with them (pp. 11, 15, 17, 20). They were not uniformed, but one witness states that most of them had with them caps with a little flag, which they told him was a Cuban flag (pp. 14, 15). They brought their own food with them (pp. 29, 30). Defendants' witnesses deny having seen rifles in the hands of all of the men, but the prosecution's witnesses swear that when they divided up the arms every man had a rifle; that certain men understood to be officers, had swords and revolvers; that one seemed to be in command of them, and that this commander asked some of the crew whether they would fight if attacked by a Spanish gunboat (pp. 11, 17, 18, 20).

The prosecution's witnesses also testify that there were some slight military exercises in the nature of drilling by from three

seven men at a time (pp. 14, 16, 17, 19, 21). The passengers stated they were going to Cuba to fight the Spaniards (pp. 12, 14, 5 15, 17). On the second day out the passengers made small canvas bags to put cartridges in ; unpacked a bale of blankets which they had brought with them, wrapped their 150 spare rifles in these blankets in small bundles, about five in each, and threw the boxes overboard in which the rifles had come : took a rifle and a sword or machete apiece and practiced with these and the cannon. There were three kinds of cartridges and two kinds of rifles. One of the witnesses states that, as he was informed by them, there were small Winchesters for the cavalrymen and big rifles for the infantry ; big revolvers for the officers ; and the cannon was a Maxim gun, in charge of a French-Canadian (p. 17).

Some testimony was introduced on behalf of the defendants to the effect that the machete is generally carried by inhabitants of the West Indies, and has many peaceful uses. The testimony is immaterial in view of the fact that there is ample evidence that the men had rifles and ammunition also. In fact, it is a matter of common knowledge that the machete is used for both war and peace, being a variety of cutlass. The Century Dictionary defines the word as follows : "A heavy knife or cutlass used among Spanish colonists and Spanish-American countries both as a tool and as a weapon." One of defendants' witnesses admitted that it was a formidable weapon, and, moreover, that he had never seen citizens carrying guns in Cuba (p. 25.)

After leaving Barnegat the Horsa took the usual course for Jamaica, which follows the Cuban coast for about six hours (p. 26). There is testimony to the effect that she had meanwhile taken steps 6 to conceal her identity by having her funnel repainted.

While at sea, and about six miles off the coast, the colored pilot gave orders to disembark (pp. 26, 28, 30). The disembarkation was conducted under the supervision of Captain Wiborg, who had the lights of the vessel put out, and it occurred about eleven at night. The two boats were launched which come on board at Philadelphia, and also those which had come with the lighter. As those were not enough, Captain Wiborg sold the men one of the ship's boats. As one of the boats leaked, another boat was lowered from the ship. The passengers took to the boats, carrying with them all the arms ammunition which they could carry. The steamer then undertook to tow the boats, but a strange light was seen in the distance, and so, at request of the men, the captain cut the boats loose and started away at full speed (pp. 12, 16, 18, 19, 26, 32). Some boxes of cartridges had been left on the Horsa, because there was not room for them on the vessel. Captain Wiborg now directed that these should be thrown overboard. He states that this was to avoid getting into trouble at Port Antonio, since the boxes were not manifested for that port (pp. 12, 27, 28). The Horsa then completed its voyage to Port Antonio.

Counsel claim that it does not appear where their clients were going when cut loose by the captain. It is difficult to guess where else than to the nearest land they could be going, when cut loose in small boats, loaded down with arms, in the Caribbean Sea, in the hurricane season.

7

The Neutrality Laws.

The section under which this prosecution was instituted is contained in Title LXVII of the Revised Statutes, which bears the heading "Neutrality." The contents of this title are commonly known as the "Neutrality Laws." Their operation, however, is not confined to the enforcement of neutrality in the strict sense of the word; that is, their operation is not dependent upon the existence of a state of belligerency between foreign powers. (13 op. 177, 178; *United States v. O'Sullivan*, 9 N. Y. Leg. Obs., 257, 268; *The Itata*, 56 Fed. Rep., 505, 511.) The heading is new. The main contents of this title, including the section involved in the case at bar, are derived from the "Act in addition to the act for the punishment of certain crimes against the United States," of June 5, 1794, ch. 50, and the "Act in addition to the 'Act for the punishment of certain crimes against the United States' and to repeal the acts therein mentioned" of April 20, 1818, ch. 88.

The history of this legislation is not of particular significance in connection with the interpretation of the section now under consideration. It has, however, been so much discussed that it may be well to state it briefly.

The obligations of the United States as a neutral nation first became an important subject of discussion when the wars of the French Revolution broke out in 1792. In the following year Citizen Genet, the famous French Girondist minister, arrived in this country and proceeded to commission officers, enlist men, and fit out privateers in aid of the Revolution; and he had also some schemes for expeditions against Spanish colonies, which attracted little attention. His proceedings called forth Washington's proclamation of neutrality in the spring of 1793. Washington and his cabinet had a very high regard for the obligations of neutrals. They also wished to avoid embroiling our young nation in the general European war. To stop Genet's privateering schemes, it was considered important to institute criminal prosecutions.

It was then the generally received opinion that the Federal courts had, to a certain extent, common law criminal jurisdiction; that the "law of nations" was a part of the Federal common law; that, treaties being part of the law of the land, their provisions in regard to neutrality could be enforced by criminal proceedings without the aid of legislation; and that therefore, although no statute had been enacted for this purpose, an indictment would lie in the Federal courts at common law for violations of neutrality.

Chief Justice Jay so charged the grand jury at Richmond, May 22, 1793 (Wharton's State Trials, 49, 56); and upon the trial of Gideon Henfield at Philadelphia, in July of that year, Justices Wilson and Iredell and Judge Peters gave their "joint and unanimous opinion" sustaining this view (id., 66, 84). Randolph, who, as Attorney-General, conducted the prosecution, had given his official opinion to the same effect, and Secretary Jefferson concurred in it (id., pp. 88, 89). It also seems to have received the support of Hamilton, who took an active interest in the prosecution (id. p. 83).

9 It was, however, strenuously opposed by the prisoner's eminent counsel, Messrs. Duponceau, Ingersoll, and Sergeant; and there was political agitation against the doctrine. (2 Marshall's Washington, pp. 273-274.) Henfield was acquitted; and immediately thereafter President Washington, in consulting his cabinet as to the advisability of calling an extra session of Congress, assigned this verdict as his first reason for favoring that step. (10 Writings of Washington, Sparks' Ed., p. 362.)

It has been argued that, since Genet's performances were so closely connected historically with the enactment of the neutrality laws, therefore these laws should be construed as aimed particularly at those violations of neutrality in which he had been so notoriously engaged.

There is, however, no historical foundation for this argument, nor was the Congress of Washington's time accustomed to legislate in that way. It was evidently their intention to provide a complete code of neutrality law for the honor and protection of the nation. It is true that the judges had unanimously declared the law of nations to be enforceable, criminally as well as civilly, without further legislation. A contrary opinion, however, having been adopted by eminent counsel and by large and influential political organizations, it was thought advisable to make certain, and at the same time codify, this portion of the law, with such amendments as might be advisable for the purposes of municipal law.

This work was recommended to Congress by President Washington in his annual address on December 3, 1793. Some of the important words in the section now before the court for its construction are to be found in this message (Annals of Congress, p. 11):

"Where individuals shall * * * enter upon *military expeditions or enterprises* within the jurisdiction of the United States * * * these offenses can not receive too early and close an attention, and require prompt and decisive remedies."

The position taken by the Administration in 1793, and confirmed by the famous act of 1794 (which is the first instance in any nation of municipal legislation in support of the obligations of neutrality) is generally recognized to have been far in advance of the general

developement of international law at that period. (Hall's International Law, § 213.)

As a result of the complications growing out of the South American revolutions and of the complaints made by Spain and Portugal against the assistance given to these revolutions by American citizens, the act of 1818 was passed re-enacting the provisions of the act of 1794, but making them applicable to "any colony, district, or people," as well as to "any foreign prince or state."

The provisions now under consideration, originally § 5 of the act of 1794, continued as § 6 of the act of 1818, is now § 5286 of the Revised Statutes, and is as follows:

"Every person who, within the territory or jurisdiction of the United States, begins, or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district or people, with whom the

11 United States are at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years.

No substantial change has been made in this section since 1818; and the only amendment made in that year besides the one already mentioned was the fixing of the pecuniary penalty of \$3,000 instead of leaving it, as in the act of 1794, "at the discretion of the court in which the conviction shall be had."

It is scarcely necessary to enlarge upon the public importance of the neutrality laws, but we take the liberty of submitting three quotations on the subject.

Before the enactment of the first of these laws, and during the Genet controversy, Secretary Jefferson wrote to Gouverneur Morris, then minister to France, as follows (3 Wharton's International Law Digest, 2nd ed., pp. 549-50):

"If I might venture to reason a little formally, without being charged with running into subtleties and aphorisms, I would say that if one citizen has a right to go to war of his own authority, every citizen has the same. If every citizen has that right, then the nation (which is composed of all its citizens) has a right to go to war by the authority of its individual citizens. But this is not true either on the general principles of society or by our Constitution, which gives that power to Congress alone and not to the citizens individually. Then, the first position was not true, and no citizen has a right to go to war of his own authority; and for what he does without right he ought to be punished. Indeed, nothing can be more obviously absurd than to say that all the citizens may be at war and yet the nation at peace."

12 Mr. Justice McLean, in his charge to the grand jury with relation to the filibustering expeditions in aid of the Canadian insurrection of 1837-8, said (2 McLean, 1, 6-7):

"A government is justly held responsible for the acts of its citi-

zens. And if this government be unable or unwilling to restrain our citizens from acts of hostility against a friendly power, such power may hold this nation answerable, and declare war against it. Every citizen is, therefore, bound by the regard he has for his country, by his reverence for its laws, and by the calamitous consequences of war, to exert his influence in suppressing the unlawful enterprises of our citizens against any foreign and friendly power.

"History affords no example of a nation or people that uniformly took part in the internal commotions of other governments which did not bring down ruin upon themselves. These pregnant examples should guard us against a similar policy, which must lead to a similar result.

"In every community will be found a floating mass of adventurers ready to embrace any cause, and to hazard any consequences which shall be likely to make their condition better; and, it is believed, that a large portion of our citizens, who have been engaged in military enterprises against Canada, are of this description.

"That many patriotic and honorable men were at first induced by their sympathies to countenance the movement, if not to aid it, is probable. But when these individuals found that this course was forbidden by the laws of their country, and by its highest interests, they retraced their steps; but it is believed that there are many

13 who persevere in their course in defiance of the law and the interests of their country. Such individuals might be induced to turn their arms against their own government under circumstances favorable to their success.

"These violators of the law should not escape with impunity. The aid of every good citizen will be given to arrest them in their progress and bring them to justice. They show themselves to be enemies of their country by trampling under foot its laws, compromising its honor, and involving it in the most serious embarrassment with a foreign and friendly nation. It is, indeed, lamentable to reflect that such men under such circumstances may hazard the peace of the country.

"If they were to come out in array against their own Government the consequences to it would be far less serious. In such an effort they could not involve it in much bloodshed, or in a heavy expenditure; nor would its commerce and general business be materially injured. But a war with a powerful nation, with whom we have the most extensive relations, commercial and social, would bring down upon our country the heaviest calamity. It would dry up the sources of its prosperity and deluge it in blood.

"The great principles of our republican institutions can not be propagated by the sword. This can be done by moral force and not physical."

President Monroe, in his annual message of December 7 1819, after speaking of the wars of independence in South America said:

"This contest has from its commencement been very interesting

to other powers, and to none more so than to the United States. A virtuous people may and will confine themselves within the limits of a strict neutrality; but it is not in their power to behold a conflict so vitally important to their neighbors without the sensibility and sympathy which naturally belongs to such a case. It has been the steady purpose of this Government to prevent that feeling leading to excess. * * * It is of the highest importance to our national character and indispensable to the mortality of our citizens that all violations of our neutrality should be prevented. No door should be left open for the evasion of our laws; no opportunity afforded to any who may be disposed to take advantage of it to compromise the interest or the honor of the nation. It is submitted, therefore, to the consideration of Congress, whether it may not be advisable to revise the laws with a view to this desirable result."

It is worthy of remark that our neutrality legislation, substantially in its present form, received the signature of President Monroe. It is a part of the system of policy which bears his name. He held that European powers should not be allowed further to extend their jurisdiction in this hemisphere. He believed, however, that the United States and its citizens should abstain from interference, upon either side, in revolutions of American colonies against their European mother countries. Hence, when citizens of the United States attempted to violate the rules of neutrality in aid of the revolutions which ended later in the independence of so many South American republics, he not only maintained the existing laws, but threw the influence of his Administration in favor of their amendment, so as to make them more clearly applicable.

It is sometimes forgotten that the so-called neutrality laws act upon both parties to such contests. While the Cubans, on the one hand, can not use our country as a source of military expeditions, Spain, on the other hand, can neither enlist volunteers in this country nor procure persons to leave it for the purpose of enlisting, without subjecting her agents to the penalties of our criminal code. (Rev. St., § 5282.)

Mr. Phillips, in his brief for plaintiffs in error, says that till the Cubans' belligerency shall be recognized, "there is nothing to prevent Spain from fitting out and sending a military expedition to Cuba to put down the rebellion, provided there is no violation of the law as to enlistment." He thus raises the claim that the words "district or people," in § 5286, do not apply to a body like the Cuban revolutionists. This is an undecided question, not material to the present case. A somewhat similar question was raised in this court by the application for a writ of *certiorari* in *The Itata*, 149 U. S., 789. The application was dismissed without prejudice, as premature, and for reasons not involving the merits of the legal controversy was not renewed.

True Construction of Statute.

The statute is, indeed, penal, but is nevertheless not to be construed with a strictness in violation of its plain meaning and intent. The authorities to this effect are clear, and are set forth in the recent opinion of this court in the criminal case of *United States v. Lacher*, 134 U. S., 624, 628-9. Among them is the opinion of Bramwell, B., in *Attorney-General v. Sillem*, 2 Hurl. & Colt., 532, a prosecution under the British Foreign Enlistment Act of 1819, which was founded upon our own Neutrality Act of 1818. (See also *The Itata*, 56 Fed. Rep., 505, 511.)

Little, if any, aid is to be found in international law. The words "expedition" and "enterprise" do not seem to be taken from books upon that department of jurisprudence, and the principles governing the rights of neutrals were, in 1794, in a state of transition. It had been not merely allowable, but customary, for neutrals to furnish organized armies to belligerents, under treaty provisions, as in the well known cases of the Swiss in France and the Hessians in the American Revolution. As late as 1788, during the war between Russia and Sweden, Denmark furnished assistance to Russia, while declaring itself to be in amity with Sweden; and during the same year, Holland made treaties for the purpose of securing mercenaries from the small German states. (Hall's *International Law*, §§ 211, 215; see also 2 Twiss' *Law of Nations*, §§ 223-225, quoting 7 Op., 367.) The views of Washington and Jefferson, as already stated, were in advance of their time, and are, indeed, considered in some respect in advance of our own time; moreover, it may be advisable, from mere precaution, for a neutral government to enact preventive legislation, beyond the international obligations of neutrality. (See 2 Wharton *Crim. Law*, 10th ed., § 1901.) The meaning, therefore, of the statute as enacted and approved must be found in the statute itself.

Question presented.—The main question presented by the 17 assignments of error in the present case is a narrow one; namely, the meaning of the phrase, "military expedition or enterprise."

It may be objected that while the statute speaks of a military expedition or enterprise, the indictment speaks of a military expedition and enterprise; and that the indictment also charges that defendants did "begin, set on foot, and provide and prepare the means for" the same. This was not in any way noticed by counsel. (See fifth, tenth, eleventh and thirteenth requests to charge, pp. 34-36); or by the court (pp. 36-37). The judge charged that defendants did not begin or set on foot the expedition, but might be convicted of providing the means for it. Whatever remedy defendants might have had at the trial, by motion to compel an election or otherwise, they can not now raise the point that they were accused, in the same count, of crimes which it was not claimed at the trial that they had committed, as well as of those which they did

commit. The general verdict of guilty is applicable to each accusation (*Ballew v. United States*, 160 U. S. 187, 197), and therefore should be applied to the one as to which evidence was introduced. (Compare *Goode v. United States*, 159 U. S., 663, 669.)

Hence we shall assume, as every body assumed at the trial, that the jury had the right to find a verdict of guilty, if any one of the offenses mentioned in the statute, and charged in the indictment, was proved beyond reasonable doubt.

(a) The important verbs and nouns in this section are in the disjunctive. It is, therefore, sufficient to prove that defendant has prepared the means for a military enterprise to be carried on from here against the territory of any foreign prince. (Compare *United States v. Quincy*, 6 Pet., 445, 464.)

(b) There can be no serious question in this case as to the meaning of the statutory phrase "prepares the means for." If the trip of the filibusters from New York Harbor to Cuba was a military expedition or enterprise, within the meaning of the statute, then there can be no doubt that there was ample evidence before the jury tending to show that the officers of the *Horsa* were concerned in preparing means for it, namely, means of transportation.

Mr. Justice McLean in his charge to the grand jury (2 McLean, at pp. 2-3) makes the following remarks upon this clause of the statute:

"To 'provide or prepare the means for any military expedition or enterprise,' within the law, such preparation must be made as shall aid the expedition. The contribution of money, clothing for the troops, provisions, arms, or any other contribution which shall tend to forward the expedition, or add to the comfort and maintenance of those who are engaged in it, is considered to be in violation of the law."

In the unreported case of *United States v. O'Sullivan* (2 Whart. Am. Crim. Law, fifth ed., § 2802, *note*) Judge Judson, in the United States district court for the southern district of New York, made the following remarks upon the same subject, which are approved by Judge Leavitt in *United States v. Lumsden*, 1 Bond, 5, 12:

"As an illustration of what has been said thus far I will remark that to purchase, charter, repair, or fit up any vessel or steamboat; to procure and put on board such vessel or steamboat powder, ball, firearms, military stores, ship stores, or any of them, to be used at any place in contravention of and with an intent to violate this act, is proper evidence; to enlist, engage verbally, or contract with men, as officers, soldiers, or musicians, to go out on such an expedition as I have defined may be considered by the jury as providing and procuring the means of a military expedition and enterprise; and if the proof shows the additional fact that these means were provided and procured for a military expedition or enterprise, then it is your business to consider such acts as falling directly within this law."

(c) There is no serious question as to the meaning of the statutory phrase "carried on from thence," which was involved in *United States v. Rand*, 17 Fed. Rep., 142; *The Mary N. Hogan*, 18 id., 529; *United States v. 214 Boxes of Arms*, 20 id., 50; and *United States v. Trumbull*, 48 id., 99. If this was a military expedition or enterprise, it was certainly carried on from the United States. The fact that the men and arms were collected in New York or vicinity, while the means of transportation were obtained in Philadelphia, is clearly immaterial.

(d) It is unnecessary to analyze closely even the meaning of the word "expedition." The statute uses in the disjunctive the words "expedition or enterprise." The distinction between these words was recognized in the famous indictments of Aaron Burr (2 Burr's Trials, 538), Smith and Ogden (Trial of Smith and Ogden, vi-xi), and O'Sullivan (*United States v. O'Sullivan*, 9 N. Y. Leg. Obs., 257, 359).

20 The word "enterprise" is much broader than the word "expedition," although we believe that either would cover the present case. It is contained, as already pointed out, in the carefully worded message of President Washington which called forth the act of 1794. It is well known that the British neutrality act or "Foreign Enlistment Act" of 1819 was based on our own act of 1818, as was recognized in *Attorney-General v. Sillem*, 2 Hurl. & Colt, 431. The British act contained no provision corresponding to the one now under consideration; but when this class of cases was provided for by Parliament in 1870, as a result of the experience of Great Britain under the act of 1819 and in connection with our civil war, it is worthy of notice that the word "enterprise" was omitted, the statute making criminal only the one who "prepares or fits out any naval or military *expedition* to proceed against the dominion of any friendly state. (Stat. 33 and 34 Vic., c. 9, § 11.) There can be no doubt that the omission was intentional and in view of the fact, which had then become matter of experience, that the demands of foreign belligerents are proportionately increased when the domestic neutrality legislation is exceptionally liberal. (See Hall's International Law, 4th ed., p. 637.)

An elementary principle requires that effect be given to every word in the statute, if fairly possible, holding none superfluous when such a construction can be avoided.

Speaking of the British Foreign Enlistment Act of 1819, in *Attorney-General v. Sillem*, 2 Hurl. & Colt, 431, 572, Pigott, B., says:

21 * * "And I confess I approve as applicable to this statute *
* * in Lord Coke's rule in *Bonham's case*, 8 Rep., 117, where
he says: 'The good expositor makes every sentence have its
operation to suppress all the mischiefs; *he gives effect to every word in the statute*; he does not construe it so that anything should be
vain and superfluous, nor makes exposition against express words.'

This court, through Mr. Justice Strong, has laid down a similar principle in *Market Co. v. Hoffman*, 101 U. S., 112, 115, as follows:

"We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant.'"

So Chief Justice Shaw and Justices Putnam, Wilde, Morton, and Dewey of the Supreme Court of Massachusetts, in their opinion rendered to the governor at 22 Pick., 511, 503, said:

"It is a sound rule of construction that every clause and word of a statute shall be presumed to have been intended to have some force and effect."

Prior judicial construction.—The paragraph under consideration has never come up for construction in this court, although it was incidentally referred to by Chief Justice Marshall in *Ex parte Bollman and Swartwout* (4 Cranch, 75, 136) as containing difficulties. The decisions of the lower courts are not entirely in accord with each other.

22 In *United States v. Pena* (69 Fed Rep., 983, 987) Judge

Wales, in his charge to the jury, assumes the words "expedition" and "enterprise" to be synonymous, and considers the statute as exacting a very high degree of organization:

"A military expedition or enterprise means a military organization of some kind, designated as infantry, cavalry, or artillery, officered and equipped or in readiness to be officered and equipped for active hostile operations."

Judge Addison Brown, of the southern district of New York, in the recent case, as yet unreported, of the *United States v. Hart*, adopts similar views:

"It is a military expedition alone that is prohibited by section 5286. * * * What, then, is a military expedition as distinguished from a nonmilitary transportation of persons for enlistment abroad? The term "expedition" signifies a journey or voyage by a body of men for some definite purpose. There are various kinds of expeditions. We have had expeditions of explorations like Wilkes' expedition, Fremont's expedition, Greely's expedition, and Peary's expeditions. And so there have been many military expeditions. We speak of Xerxes' expedition into Greece. A military expedition, therefore, is an undertaking by a body of men of a military character. There must be a body, because one or two men can not constitute an expedition. * * * The essential elements of a military body are, first, soldiers, as is indicated by the very word 'military,' derived from miles, a soldier. The fundamental idea of a military enterprise or expedition to be 'carried

on ' from this country is that it is undertaken by soldiers or
 23 in some military service. Next is the relation of the soldier
 to the commander. It imports officers and the duty of mili-
 tary obedience. Next, arms; such arms as are appropriate to the
 enterprise; such as will enable the body to do the military work
 contemplated. Next, that it shall act as a unit in a military way,
 i. e., as a body bound together by organization under a definite
 command. And finally, a military purpose, a purpose of attack or
 defense; a hostile purpose. * * * It must be complete at the
 start, or possess all the elements of a military body. It is sufficient
 if there was a combination by the men for that purpose with the
 agreement and the intention of the body that embarks, that it should
 become a military body before reaching the scene of action. * * *
 If, however, the expedition or enterprise was designed only to trans-
 port munitions of war as merchandise to Cuba, though for the use
 of the insurgent army, and at the same time to transport a body of
 men as individuals to Cuba, who wish to enlist there, and that was
 all, then it was not a military expedition or enterprise under this
 statute; it would not be so unless the men had first combined or
 agreed to act together as a military force, or contemplated the exer-
 cise of military force in order to reach the insurgent army."

In remarks prior to the charge the learned judge stated his views,
 as follows:

"My opinion is unchanged that a mere expedition designed to
 land in Cuba, the individuals to enlist after they get there, which
 is not accompanied by any military organization before that, does
 not constitute a military expedition. That intention is too remote
 to bring it within this statute without the enterprise was military
 at the start, there being no present organization and no pres-
 24 ent contemplation to employ military force before the arrival
 in Cuba. What they do there is another thing."

Being asked by counsel as follows:

"Do I understand your Honor to mean that this body of men as
 a unit, as a regiment or a squadron or a battalion, if you please,
 are to remain as a unit and as a unit to become part of the Cuban
 army?"

The learned judge answered:

"I understand that a military body acts as a unit and the essence
 of a military body is one under military command, under the direc-
 tion of an officer whom the men are bound to obey, under military
 discipline, and it must be contemplated that they are to act by the
 direction of some military officer and be bound by the sanction of
 military obligations."

Upon this charge the defendants were acquitted.

Judge Judson, in *United States v. O'Sullivan, supra*, distinguishes
 between the words "expedition" and "enterprise," and gives a much
 broader meaning to the word "military."

"Before the jury can convict on this indictment, it must be proved to their satisfaction that the expedition or enterprise was in its character military or, in other words, it must have been shown by competent proof that the design, the end, the aim, and the purpose of the expedition or enterprise was some military service, some attack or invasion of another people or country, state or colony as a military force. * * * But any expedition or enterprise in matters of commerce or of business, of a civil nature, unattended by a design of attack, invasion or conquest, is wholly legal and is not an expedition or an enterprise within this act. * * *

25 term 'expedition' is used to signify a march or journey with martial or hostile intentions. The term 'enterprise' means an undertaking of hazard, an arduous attempt.

The definitions of "expedition" and "enterprise" given by Judge Judson are quoted in *United States vs. Lumsden*, *supra*; and his language is substantially incorporated in the charge of Judge Maxey in *United States vs. Ybanez*, 53 Fed. Rep., 536. Judge Maxey continues (p. 538):

"This statute does not require any particular number of men to band together to constitute the expedition or enterprise one of a military character. There may be divisions, brigades and regiments, or there may be companies or squads of men. Mere numbers do not conclusively fix and stamp the character of the expedition as military or otherwise. A few men may be deluded with the belief of their ability to overturn an existing government or empire, and, laboring under such delusion, they may enter upon the enterprise. * * * The proof must establish in your minds the fact that the expedition or enterprise was of a military character, and when the evidence shows that the end and object were hostile to or forcible against the republic of Mexico, then it would be to all intents and purposes a military expedition. * * * Evidence showing that the end and objects were hostile to or forcible against a nation at peace with the United States characterizes it to all intents and purposes as a military expedition or enterprise."

In *United States vs. Hughes*, 70 Fed. Rep., 972, 975, Judge Brawley laid down the following test:

26 "The uncombined elements of an expedition may leave a neutral state in company with one another, provided they are incapable of proximate combination into an organized whole.' It would be different if the men had previously received such military training as would have rendered them fit for closely proximate employment."

The quotation is from Hall's *International Law*, 4th ed., p. 631; the "uncombined elements" referring to the men, arms, and ammunition.

Judge Brawley's charge in this case is unreported, but we insert a few extracts showing the position taken at the trial. It should be remarked in explanation of the instructions, that according to the

testimony for the prosecution, the passengers armed themselves and drilled regularly on deck during the voyage to Cuba; and the truth of this testimony was one of the principal points litigated.

"There would be no question that a military company organized, as infantry, artillery or cavalry, with officers, arms, and equipments, would constitute such a military force that the transportation of it from within our territory or jurisdiction would come within the prohibition of this statute. The uncombined elements of such a force—that is to say, individuals not drilled or organized, or capable of being put into a state of efficiency for warlike operations—would not constitute a military expedition within the meaning of this statute, and the transportation of such individuals as passengers would be legitimate commerce, such as our laws permit. * * *

If they came aboard and were received as ordinary passengers in unarmed association and were carried simply as passengers and
 27 neither before they came aboard or after they came aboard
 were they organized as a military company, then under the law as given to you the transportation of those men would not be an offense under this statute. But if after they got aboard they took the arms from the boxes, and organized into a company or organization, if they were drilled or went through the manual of arms under the leadership or direction of one man or more, if they themselves became a military organization by reason of such coming together, and of such drill or instruction, then from that time forth they would be a military organization or enterprise within the meaning of this statute."

The defendant was acquitted, although the proof was in most respects similar to that in the case at bar.

Judge Butler, in the case at bar, lays down the rule as follows (Rec., p. 37):

"In passing on the first question, it is necessary to understand what constitutes a military expedition within the meaning of this statute. For the purposes of this case it is sufficient to say that any combination of men organized here to go to Cuba to make war upon its government, provided with arms and ammunition, we being at peace with Cuba, constitutes a military expedition. It is not necessary that the men shall be drilled, put in uniform, or prepared for efficient service, nor that they shall have been organized as or according to the tactics or rules which relate to what is known as infantry, artillery, or cavalry. It is sufficient that they shall have combined and organized here to go there and make war on a foreign government, and to have provided themselves with the means of doing so. I say, provided themselves with the means of doing so because the evidence here shows that the men were so provided.

Whether such provision, as by arming, and so forth, is neces-
 28 sary need not be decided in this case. I will say, however, to counsel that were that question required to be decided, I should hold that it is not necessary.

Nor is it important that they intended to make war as an independent body or in connection with others. Where men go without combination and organization to enlist as individuals in a foreign army they do not constitute such military expedition, and the fact that the vessel carrying them might carry arms as merchandise would not be important."

Meaning of "enterprise."—The definitions of "expedition" and "enterprise" given by Judge Judson, *supra*, are taken substantially from Johnson's Dictionary. The Century Dictionary gives the following:

"*Expedition*: 3. An excursion, journey, or voyage, made by a company or body of persons for a specific purpose; also such a body and its whole outfit.

"*Enterprise*: 1. An undertaking; something projected and attempted; particularly an undertaking of some importance or one requiring boldness, courage, or perseverance."

Webster's latest edition gives the following:

"*Expedition*: 3. An important enterprise implying a change of place; especially a warlike enterprise, a march or voyage with martial intentions; an excursion by a body of persons for a valuable end, as a military, naval, exploring, or scientific expedition; also the body of persons making such an excursion.

"*Enterprise*: 1. That which is undertaken; something attempted to be performed; a work projected which involves activity, courage, energy, and the like; a bold, arduous, or hazardous attempt; an undertaking.

29 In ordinary parlance, an expedition involves the idea of some considerable degree of organization. There is no such element in the idea of an enterprise; and the latter word would seem to have been added by Washington in his message of 1793, and by Congress in the following year, in order to preclude such reasoning as that which was adopted by Judge Brown in the case above quoted.

It is submitted that every definition of "enterprise" is answered by a body of men who, by whatever means, are collected together with sufficient coherence and co-ordination of action to board, at sea, a tug loaded with arms, travel a dozen leagues on the ocean, meet a steamer by prior arrangement, board the steamer with the arms, open the boxes and distribute the arms among themselves, and then by preconcerted methods land with the arms on the Cuban coast.

Some organizations are loose democracies, while others are modeled after the methods of despotic monarchies. In the field of politics we are familiar with every grade of organization between these limits. No one, however, would deny the name of organization to a body of men who were able to combine for the accomplishment of such results as those just described, even if they acted at

every turn by common consent and no man ever surrendered his individuality to the control of any leader.

An organization journeying in this manner from New York Harbor into the West Indies is certainly an "enterprise." It remains to consider whether it is a "military" enterprise.

30 *Meaning of "military."*—Judge Butler in the case at bar has followed the weight of authority; but the authorities, as has been seen, are few and not in harmony. Judge Brown has since refused to follow him, holding that an enterprise, to be military, must have something more than a military purpose; that it must be "under the direction of an officer whom the men are bound to obey under military discipline," and "bound by the sanction of military obligations." Under this definition it is clear that the modern form of filibustering is safe from the criminal law. In these games of the telegraphs and telephones the organization, equipment, and launching of a complete military expedition, such as Judge Brown had in mind, is no longer practicable without the consent of the home government. On the other hand, this form of expedition is no longer necessary. Foreign countries are now so near in point of time that loose organizations of volunteers who plan to keep together as a unit until they can reach and become absorbed in the belligerent army, are entirely practicable; and they are now, perhaps, the only surviving form of filibustering enterprise.

The word "military" has no defined legal meaning applicable to this statute, nor has it any sharp, defined meaning in the vernacular. No lexicographer would confine its application to bodies of men organized as cavalry, infantry or artillery, under the strict discipline of modern war.

The Century Dictionary gives the following definitions:

"1. Having the position or character of a soldier; pertaining to soldiers; suitable to, characteristic of, or performed by soldiers; soldierly.

31 "2. Relating or pertaining to war, to the art of war, or to an armed force; adopted to or connected with a state of war; martial; warlike; belligerent."

Webster gives the following:

"1. Of or pertaining to soldiers, to arms or war; belonging to, engaged in, or appropriate to the affairs of war.

"2. Performed or made by soldiers."

It is respectfully submitted that an "enterprise" is military whenever, in the language of the Century Dictionary, it is "relating or pertaining to war," or "connected with a state of war;" whenever, in the language of Webster, it is "belonging to, engaged in, or appropriate to the affairs of war."

Judge Judson, in the O'Sullivan case, as above seen, makes "the design, the end, the aim and the purpose" of the enterprise to be the turning point. Judge Maxey, in the Ybanez case, in words of

similar purport, makes it "the end and object." This, it is submitted, is the correct test. An enterprise may be commercial or religious, or perhaps educational, or even sporting; or it may be military. What criterion is possible, other than the *intent* of those who are engaged in it? If this be the correct criterion, then it is not absolutely essential that the men who were banded together should be accompanied with arms when they leave the United States, although evidence on this point is important as bearing on the character of the enterprise. One agent of the belligerent power may be in the United States collecting men, while another is in Europe collecting arms. The men may come on one steamer
 32 and the arms on another. If the men make the voyage together as a body, with intent to arm themselves on or before arrival at the seat of war, the enterprise is a military one.

For the purposes of the present case, however, it is not necessary to go to this extent. It is sufficient to apply the test given by Mr. Hall in his work on international law, and quoted by Judge Brawley in his opinion above cited. If the men, arms and ammunition appear on the same vessel, and if they are "capable of proximate combination into an organized whole," and especially if they are in fact in process of combination, the enterprise is military in every sense of the term, unless it be construed with such excessive strictness as to require the semi-organized force to be composed of *milites* in the technical sense of the word—that is, of men who have already formally enlisted in the service of one of the belligerents.

Judge Brawley has referred to an opinion of Hamilton Fish as Secretary of State during the Franco-German war of 1870. No such opinion seems ever to have been put in writing, nor have we any statement of it from American sources. The learned judge's statement seems to be based upon an informal communication to the Prussian minister, which in some way reached the ears of the English minister, and was by him communicated to the home Government. It would have been forgotten had not standard writers on international law rescued it from oblivion and given it their assent. It
 33 would appear that the Prussian minister complained of the fact that the transatlantic steamer Lafayette was carrying a large cargo of arms and ammunition for sale to the French, while at the same time it was carrying about 600 French passengers, all of whom, as was generally supposed, intended to enlist in the army of their nation on arrival. These passengers, however, seem to have been all traveling as individuals without any concert of action; and they had no access to the arms and ammunition, any more than an ordinary passenger on an ocean steamer has access to any part of the cargo. Mr. Fish was asked not to arrest the men, but to stop the ship. In other words, he was asked to act under § 5283, not under § 5286. He replied that the ship seemed not to be intended for hostile purposes against North Germany, and that the arms and ammunition were articles of a legitimate commerce. It is stated that eighty-six

of the men had previously been arrested on board the Lafayette, but discharged for lack of proof. (61 British and Foreign State papers, p. 822.) He made no ruling as to what constitutes a "military expedition," and the test of "proximate combination" is Mr. Hall's, not his.

Had the Secretary actually ruled that the Lafayette carried no expedition there would be much force in the arguments supporting him.

When, however, the men and the cargo come aboard together; when the men have control of the cargo; when they are organized to the extent of acting in concert; when, whether or not they have any other leader, they are accompanied by a pilot brought by themselves and who acts as guide to their common destination; when they land themselves and their cargo together by their own
 34 physical efforts—can there be any doubt that Mr. Fish would have considered this case to be one of a military enterprise?

It is submitted that the word "military" may be properly applicable, not only to a body of men organized or quasi-organized, but even to a single man. When Samson went out and slew one thousand men with the jawbone of an ass, his actions were clearly of a military character. There was little organization in John Brown's party of 22 men when it captured Harper's Ferry, but the capture was clearly the result of a military enterprise.

Had Secretary Fish refused to stop the 600 Frenchmen in 1870, this would not have been, because their exodus was non-military in character, but because it lacked sufficient combination to constitute an "enterprise" within the meaning of the statute. We have judicial authority to the effect that it is unnecessary for the purposes of the statute to show that the voyagers have control of the vessel. In *Ex parte Needham* (Pet. C. D., 487), decided in 1817, a company of ten men en route from Holland to join the insurgents in South America took passage as ordinary passengers on a vessel bound for St. Thomas. On being arrested they claimed that the statute did not apply to their case because they were only passengers and not in control of the vessel. This claim was overruled by Mr. Justice Washington and Judge Pennington.

Mr. Boyd, in his edition of Wheaton's International Law, §439aa, makes the following remarks upon this point:

35 "It is impossible to lay down any hard and fast line separating commercial transactions in munitions of war and the organizing of hostile expeditions. International law is necessarily incapable of being defined and laid down with the precision attainable by municipal law. The question is one of intent, and it is the duty of a neutral government to exercise due diligence in ascertaining what the real character of the transaction may be. The elements of a hostile expedition are thus described by Professor Bernard: 'If at the time of its departure there be the means of doing any act of war—if those means, or any of them, have been pro-

cured and put together in the neutral port—and if there be the intention to use them (which may always be taken for granted when they are in the hands of the belligerents), the neutral port may be justly said to serve as a base or point of departure for a hostile expedition.” (Montague Bernard, *Neutrality of Great Britain*, p. 399.)

Assignments of Error.

We now proceed briefly to consider the assignments of error *seriatim*.

I, II. The first two assignments of error relate to the admissibility of declarations of the party, during the voyage, as to their destination.

One of the prosecution’s witnesses, Frederick C. Lee, engineer of the steam lighter J. S. T. Stranahan, testified on cross-examination that he had spoken “to a couple of those young fellows there, and they said they were Cubans.” On redirect examination he was asked: “Q. Did they tell you where they were going?” The answer, admitted over defendant’s objection, was: “They told me they were going to Cuba. They did not say what they were
36 going to do.” This question and answer seem entirely unobjectionable in view of the cross-examination; and also absolutely without any importance, since it is an uncontroverted fact in the case that the party meant to go, and did go, to Cuba.

The witness Carl Arnston, a fireman on the Horsa, was asked: “Q. Did you have any talk with any of these men?” The question was objected to “unless it [the talk] was in the presence of these defendant.” The objection was overruled and exception taken. Hence, if any talk between this fireman and the passengers, not in defendants’ presence, might be competent, the objection was not good. The answer was: “A. Yes, sir. I was going in the forecabin one night and he told us, ‘I go down to Cuba to fight.’ Q. To fight who? A. The Spanish.” There was no objection to the second question; no objection, and no motion to strike out, as to either answer. The record does not show who made these statements, or how many persons were present when they were made. It was not even brought out that the defendants were not present.

It is submitted that the exception was not sufficient. Assume, however, that the record sufficiently raises the question of admissibility of the filibusters’ statements concerning the object of their voyage. Were these statements incompetent?

It should be borne in mind that a secret combination between the officers of the Horsa and this mysterious party had already been completely proved. The former started from Philadelphia, the latter from New York. They exchanged preconcerted
37 signals on the ocean; joined together for a few days’ voyage; then parted on the high seas, again by preconcerted action and at dead of night. Was the secret combination thus proved a lawful combination or an unlawful conspiracy?

When a secret combination is once presumptively proved, and it remains only to ascertain its motive so as to know whether the combination is lawful or unlawful, then declarations of any one of the persons engaged in it, accompanying and explaining acts in furtherance of its object, are competent evidence against all. This rule is not confined to actions whose gist is conspiracy. It applies equally to civil and to criminal cases. (*Nudd v. Burrows*, 91 U. S., 426, 437-439, and cases cited; *St. Clair v. United States*, 154 U. S., 134, 149; *State v. Daubert*, 42 Mo., 239, 241; 2 Bishop *Crim. Pro.*, § 228.)

The rule is stated as follows by Mr. Justice Field in *Lincoln v. Claflin* (7 Wall., 132, 139):

"The declarations of each defendant relating to the transaction under consideration were evidence against the other though made in the latter's absence, if the two were engaged at the time in the furtherance of a common design. * * *"

It is not material, however, that the declarant should be joined as codefendant with those against whom his declarations are introduced in evidence. (*Nudd v. Burrows*, *supra*.)

In *American Fur Co. v. United States*, 2 Pet., 358-365, Mr. Justice Washington said:

"We hold the law to be that where two or more persons are associated together for the same illegal purpose any act or declaration of one of the parties in reference to the common object and forming a part of the *res gestæ* may be given in evidence against the others."

In *People v. Davis*, 56 N. Y., 95, 102, 103, Grover, J., said:

"Anything said accompanying the performance of an act, explanatory thereof or showing its purpose or intention, when material, is competent as part of the act. * * * The general rule is that when sufficient proof of a conspiracy has been given to establish the fact *prima facie* in the opinion of the judge, the acts and declarations of each conspirator in the furtherance of the common object are competent evidence against them all. But to make the declaration competent it must have been made in the furtherance of the prosecution of the common object or constitute a part of the *res gestæ* of some act done for that purpose."

To the same effect we may cite *Jones v. Simpson*, 116 U. S., 609; *State v. Soper*, 16 Me., 293, 297; *Commonwealth v. Tivnon*, 8 Gray, 375, 381; *Colt v. Eves*, 12 Conn., 243, 256; *Crary v. Sprague*, 12 Wend., 41, 44; *Smith v. National Benefit Soc.*, 123 N. Y., 85, 88-89; *State v. Shelledy*, 8 Iowa, 477, 486, quoted in 2 Thompson on Trials, § 2455; *United States v. McKee*, 3 Dill., 551, 560; 1 Phillipps on Evidence, 4th Am. ed., pp. 185, 205, and notes.

The rule is stated as follows by Mr. Bishop (*Bishop's New Crim. Pro.*, § 1248):

"On its being shown that one or more persons were acting in concert with the defendant about the thing in question, all with a

common object, declarations during its progress, by any one
 30 of the others, whether present or absent, may be given in
 evidence against the defendants; yet not declarations after
 the transaction is ended."

Mr. Starkie summarizes the result of the authorities as follows
 (Starkie on Evidence, pp. 466-8):

"An entry or declaration accompanying an act seems, on principles already announced, to be admissible evidence in all cases where a question arises as to the nature and quality of that act. * * * Such evidence is also admissible, on the same principle, to show the intention with which the act was done, where the intention was material. * * * Indeed, wherever an entry or declaration reflects light upon, or qualifies, an act which is relevant to the matter in issue and is evidence in itself, it becomes admissible as part of the *res gestæ*, if it be contemporaneous with the act, or so connected with it as to render it part of one continuous transaction."

It is, indeed, often said by courts and text writers in stating the rule, that the declarations must be made "in furtherance of a common design." This phrase, however, is not to be understood as requiring that the declaration itself, *ex proprio vigore*, must be of such a character as to further the design. Declarations accompanying and explaining acts which are in furtherance of the design are admissible. All statements, therefore, made by any of the filibusters during the voyage are proper for the consideration of the jury, if the jury come to the conclusion that the defendants, before they sailed from Philadelphia, had become involved in the enterprise.

It is to be remarked, however, that the declarations referred
 40 to in these assignments of error were, *ex proprio vigore*, in
 furtherance of the purposes of the conspiracy. It was important for the filibusters to be on terms of confidence with the crew, and to enlist their active sympathy. It appears that hope was even entertained of enlisting sympathy to the extent of gaining the aid of the crew in the fight, if there should be an attack by a Spanish gunboat. (Record, p. 20.)

The extent to which evidence of this kind is admissible is much in the discretion of the trial court. (*Clune v. United States*, 159 U. S., 590, 592-3.)

III. This assignment of error brings in question the correctness of Judge Butler's definition of "military expedition or enterprise." His definition has already been quoted. It will be noticed that the paragraph as set forth in the assignment of error omits the last sentence quoted by us, and also differs in punctuation.

In the midst of Judge Butler's definition given to the jury, three sentences are to be found which were addressed to counsel, not to the jury, and which state what the learned judge's opinion would be, if there had been no evidence that the voyagers had provided themselves with arms and ammunition. We have argued that the opinion so stated would have been correct, if given in the form of

instruction to the jury. It was not so given, however; was not material in view of the facts of the case; and need not therefore be considered.

The correctness of the learned judge's definition we shall not here discuss, as it coincides with our own views as already fully set forth.

He instructed the jury that to constitute a military expedition there must be combination, organization, and a provision of arms and ammunition. He also, in the last sentence of his definition (the one omitted in the assignment of error), recognized the distinction taken by Mr. Hall and approved by Judge Brawley, as already set forth.

The exception upon which this assignment is attempted to be based is as follows (p. 41):

"Counsel for defendants except to that part of the charge of the court giving the definition of a military expedition."

It is submitted that this exception is not sufficiently specific. (*Thiede v. Utah*, 159 U. S. 510, 521.)

IV. This and the seven following assignments of error are based upon the following exceptions (p. 41):

"To the refusal of the court to read the points that were not read to the jury.

"To the refusal of the court to affirm all the points without qualification.

"To the refusal of the court to affirm each point without qualification."

These are all insufficient. (*Thiede v. Utah*, *supra*.) We shall consider the assignments, however, separately.

The instruction here requested by the defendants was properly qualified by the court. As drawn by the defendants, it would make every conceivable military expedition lawful.

V. See IV, *supra*. The instructions here asked by defendants was entirely inapplicable to the case, and covered matters upon which the court had already fully charged.

42 VI, VII. See IV, *supra*. The instructions here requested, if our arguments as to the true construction of the statute be correct, were erroneous as requiring organization in the form of cavalry, infantry, or artillery, officered and equipped for active hostile operations.

VIII. The instructions here asked are subject to the same criticisms as made in IV, *supra*.

IX, X. See IV, *supra*. The instructions here asked are subject to the same criticisms already made in VI, VII, *supra*.

XI. This assignment of error raises the jurisdictional question. It is based on the following exception (p. 42):

"To the statement of the court that even if an agreement to furnish and provide the means of transportation was made within the jurisdiction of the United States to carry on a military expedition which was not consummated until they got outside of the three-mile

limit, that constituted an offense against the laws of the United States."

It will be remembered that the crime is preparing the means for an unlawful military enterprise.

The court charged as follows with relation to the actions of the defendants (pp. 38-41):

"If * * * the defendants did not start from the shore under an agreement to provide the means for transporting and to transport the men, but were ignorant of the object of going to Barnegat until they reached there, they can not be convicted.

"If, however, they entered into an arrangement here
43 [Philadelphia] to furnish and provide the means of transportation, and provided it, they are guilty, if this was a military expedition, although the men were not taken aboard and the transportation did not commence until the ship anchored off Barnegat.
* * * To convict the defendants it is necessary that the Government shall have satisfied your minds beyond a reasonable doubt that this was a military enterprise, and that defendants when they started knew it. Otherwise they are not guilty. * * *

"You must determine whether they understood what the expedition and its objects were, and had arranged and provided for its transportation when they left Philadelphia or left our shores within the three-mile limit stated. If they were ignorant on this subject until they anchored off Barnegat light, the point being according to the testimony beyond the jurisdictional limits of the United States, no offense was committed, as I have before stated, against the laws of this country. The question, therefore, is: Did the defendants understand they were to carry this expedition, and have provided for it and understand what the expedition was before leaving here [Philadelphia]? * * * You, * * * from all the evidence must determine whether the defendants left here [Philadelphia] with knowledge of the provision for what they were about to do.

"I now submit the case to you, reminding you of its importance."

Thus the court, in very clear language, frequently repeated, impressed upon the jury that, although the expedition or enterprise were a military one, nevertheless the defendants were not criminally responsible unless they were aware of its nature before they sailed from Philadelphia. The court did, indeed, once state that they

44 were responsible if they knew of it before they got outside the "three-mile limit;" but this remark was not applicable to the facts in the case, was apparently not noticed by counsel, was not excepted to, and would in any case be immaterial, there being no question of venue raised as between Pennsylvania and New Jersey.

The military expedition or enterprise started, indeed, in the southern district of New York, and did not come into immediate contact with the defendants at any point within the jurisdiction of the United States, since the Horsa was a foreign vessel. Nevertheless,

the *Horsa's* preparation for sailing, and the taking aboard of the two boats at Philadelphia, constituted a preparation of means for the unlawful expedition or enterprise. The means thus prepared were not only important, but essential. Without them the filibusters could not have reached their destination. That the *Horsa* and its officers were foreign (assuming that the mates as well as the captain are foreigners) is immaterial. They committed a statutory crime upon American soil; and having committed it in the eastern district of Pennsylvania, they were properly indicted and tried in that district.

XII. This assignment of error is based upon three exceptions.

The first exception is as follows (p. 41):

"To the statement of the court that the men were armed."

This exception seems to be based upon a fundamental misconception of the nature of a writ of error. Upon such a writ the appellate tribunal can consider only errors of law, not errors of fact.

45 Whether or not the men were armed is a question of fact.

It was stated by the court as a fact, and not as a conclusion of law. Even, therefore, if the statement had been a mistake, it would not be the proper basis of an exception. From the numerous authorities we may cite *Carver v. Astor*, 4 Pet., 1, 3; *Mitchell v. Harmony*, 13 How., 115; *Vicksburg, &c., R. R. Co. v. Putnam*, 118 U. S., 545, 553; *Baltimore, &c., R. R. v. Fifth Baptist Church*, 137 U. S., 568, 574.

The statement, however, was based on uncontradicted testimony. The prosecution's testimony to the effect that the men were all armed with rifles was not directly contradicted; and it was admitted by everybody that the men all had machetes, which, as already shown, are weapons of war as well as of peace, and which could have had no possible peaceful use upon a vessel at sea.

The other exceptions relate to the court's statement that "if these men were in combination to do an unlawful act, what was said by any of them at the time in carrying out their purpose was evidence against them all as to the nature of their expedition." This has already been discussed. (I, II, *supra*.)

XIII. This assignment is based upon the following exception (p. 41):

"To the statement of the court that in its opinion this was a military expedition."

The court's statement in full is as follows (p. 39):

"That this was a military expedition, designed to make war against the government of Spain would seem to the court to be free from reasonable doubt. The question, however, is one for
46 your determination alone, and I submit it to you as such, reminding you that the responsibility of deciding it rests upon you only.

"If you find that this was not a military expedition, or, rather, if you are not fully satisfied that it was, your verdict will be for the defendant without going further."

This seems to perform the functions of the court, without trespassing upon the province of the jury, within the many decisions of this court, among which we need cite only *Simmons v. United States*, 142 U. S., 148, 155. In that case the trial judge had charged the jury "that he regarded the testimony as convincing," having already "told them in so many words that the facts were to be decided by the jury and not by the court." This court, speaking by Mr. Justice Gray, approved the instruction.

XIV. This assignment has already been discussed under XI, *supra*.

XV. This assignment of error is based upon no exception. There can be no question that the trial judge properly submitted to the jury the question of Captain Wiborg's veracity in stating that he was ignorant of the service required of him until he reached the point near Barnegat. Not only was the captain an interested party but his own testimony disclosed grave doubts of his veracity, as in his claim that the proceedings did not appear to himself to be unusual (p. 29); in his failure to produce the charter-party and alleged sailing orders upon which he pretended to rely (pp. 26-27, 29); and in his prevarication to the collector at Port Antonio (pp. 232, 33). An assignment of error without an exception will not be considered. (*Tucker v. United States*, 151 U. S., 16170; *St. Clair v. United States*, 154 U. S., 134, 153.)

XVI. This assignment is also founded upon no exception. It is proper for the trial judge in charging the jury to speak of the importance of enforcing penal laws with the reasons therefor. (See *Thompson on Trials*, § 2456.)

XVII, XVIII. The jurisdictional point raised by the motion in arrest of judgment has been already discussed. (XI, *supra*.)

The prisoners failed on the trial to move for a direction to acquit. They now apparently endeavor to remedy the omission by means of a motion in arrest of judgment. This they cannot do, because the bill of exceptions is not before the court upon such a motion. (*Bishop's New Crim. Pro.*, § 1285.)

There was, however, before the jury, not merely some evidence but most cogent and convincing evidence, that the Horsa expedition was military in character. Very possibly the filibusters intended to separate when they reached headquarters, and become merged as individuals in the insurgent army. But they more clearly intended, until that time, to stand together and defend themselves with arms if necessary.

The remaining exceptions seem to need no notice.

48 It is respectfully submitted that the judgment should be affirmed.

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EDWARD B. WHITNEY,

Assistant Attorney General.

1 Supreme Court of the United States, October Term, 1895.

J. H. S. WIBORG, JENS P. PETERSEN, AND HANS JOHANSEN, Plaintiffs in Error,	}	No. 986.
vs.		
THE UNITED STATES.		

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

Paper-Book of Plaintiffs in Error.

1. HISTORY OF THE CASE.

The steamship Horsa was a vessel sailing under the flag of Denmark, and the defendants below were some of her officers. J. H. S. Wiborg was Captain, Jens P. Petersen was First Mate, and Hans Johansen was Second Mate; they were all subjects of the
2 King of Denmark; the crew were Danes or Norwegians, and Danish was the language used on the steamer. The Horsa, over two years ago, was chartered by the J. D. Hart Company of Philadelphia, and the charter had been renewed from time to time. By the terms of the charter, the steamer and her Captain were under the absolute control and direction of the charterer, and the Captain was compelled to go and take the steamer wherever the charterer would send him between the St. Lawrence River and the River Platte. She was employed in carrying freight and passengers, sailing from Philadelphia to various points in Cuba and Jamaica; she made one voyage from Savannah to Africa, with a colony of about two hundred negroes; but she was employed principally in carrying merchandise to Cuba and Jamaica, and bringing cargoes of fruit from those islands to Philadelphia.

On November 9th, 1895, the Horsa cleared from Philadelphia for Port Antonio, Jamaica. She had on board, as a passenger, a lady who was the wife of the Chief Engineer; she also had on board, as cargo (p. 25) to be delivered in Jamaica, two row boats, a lot of empty boxes and barrels, two horses, some horse feed, and bales of hay and bags of corn, all of which were entered upon her manifest. Just before sailing, the Captain, as was customary, received a message or order from the Agent of the charterer; the message or order directed him (p. 25) after leaving the breakwater to proceed North near Barnegat and wait further orders. The pilot who piloted the steamer down the Delaware River, left her at the breakwater; and the Captain, in obedience to his orders, proceeded Northward. When opposite Barnegat, the engineers reported that a bearing was hot, and asked for an hour or two to fix it. The Captain stopped the steamer, and as a gale of wind was

blowing from the North-West, he anchored her at a point between four and five miles off shore, and hoisted a white flag, which is the signal to show that the steamer was waiting orders, and was

3 not in distress. About noon on November 10th, the steam lighter Stranahan, from New York, having on board some men and boxes and baggage, came alongside the Horsa. One of the men, a colored man who was called a Pilot, delivered to the Captain of the Horsa an order in writing from the J. D. Hart Company (p. 25,) directing the Captain to take the men on board the Horsa, with their luggage and whatever they had, and to let them off wherever the bearer of the order would ask to be let off, and to deliver to them the two boats that had been shipped at Philadelphia. No extra food or other provisions for the men had been taken on board the Horsa at Philadelphia, but the order stated that the men had their own provisions with them, and were not to be provided for by the Captain or the steamer. The pilot and men and what they had with them were transferred from the lighter to between decks in the hold of the Horsa. There were 39 men, some articles of baggage, about 40 boxes, and two boats. About one-half of the men were Americans who used only the English language, and the other half spoke in a language supposed by the witnesses to be Spanish; they had no uniforms, and were all dressed as ordinary civilians or working men; they had no arms or weapons of any kind about their persons, had no apparent organization, and had no leader or person to give them directions. There were about 40 boxes, of different sizes and shapes, the largest being one about six feet in length. The boats were ordinary surf or row boats.

The crew of the Horsa consisted of twenty men, six of whom were firemen. After the men and boxes were taken on board from the lighter, five of the firemen, (four of whom at the trial were witnesses for the Government), at the instigation and under the leadership of Emil Fredericksen, one of their number, went on deck in a body to the Chief Engineer, and told him (p. 18) that they would not go on that voyage without extra pay. The Captain, who was pass-

4 ing at the time, inquired what was the matter, and the Chief Engineer informed him of the demand made by the firemen. The Captain told the firemen to go below and mind their own business, as he was responsible. The firemen went below, the anchor was raised, and the Horsa proceeded on her voyage to Jamaica.

The voyage from Barnegat to Cuba is made in about five days, and to go to Jamaica requires nearly one day longer. The first land sighted is the Island of San Salvador or Watling Island, which, with a number of small islands, form what is called the Crooked Island Passage; then the large Islands of Cuba and San Domingo come in view, these and a large number of islands being visible from the deck of the vessel. And in proceeding to Jamaica, the vessel sails for about eight hours parallel with the coast of Cuba, between Cuba and San Domingo.

At first the men who were taken on board at Barnegat were seasick, and remained in the hold of the Horsa; then they began coming on deck. They lived upon canned goods and hard bread which they had with them in the boxes, and ate their food in the hold. Usually not more than ten or twelve of them were on deck at one time. Some of them had guns or rifles, some had machetes, and others had pistols. Those with guns or rifles carried the guns or rifles in their hands when walking about the deck, or stood them against the railings when sitting or laying down; the machetes were worn in a belt around the waist, or slung with a strap from the shoulder; the pistols were fastened to a belt around the waist; and some had a few cartridges in their belts. They brought on deck a small cannon about the size of a ship's cannon, and variously described as three or four feet in length, which they set up on small wooden wheels, and left on the middle of the deck in the place usually occupied by one of the ship's cannon which was then in the hold. They were quiet and reticent, and only a few of them talked to or had any conversation with the witnesses for the Government.

5 On the night of the fifth day, when the steamer was between Cuba and San Domingo, and more than six miles off the coast of Cuba, and Cuba was not visible from the steamer, the colored pilot who had brought the order to the Captain off Barnegat, went to the Captain and asked him to stop the steamer and let him and the men off there. The Captain stopped the steamer and ordered all the lights to be put out. The four boats, being the two that had been taken on board off Barnegat and the two that had been shipped at Philadelphia, were lowered into the sea; one of the boats began to leak and could not be used, and the Captain sold the pilot one of the ship's boats to take the place of the leaking one. Some of the boxes were broken open, and a number of guns or rifles were taken out and wrapped in blankets, and the wheels were taken off the cannon; the pilot and men got into the boats, taking with them the cannon, the wheels, the blankets containing the guns or rifles, and some of the boxes. It was found that the boats would not hold all the boxes, and a number of them were left on the steamer. The pilot asked the Captain to tow the boats a little further; the boats were then fastened with a line to the stern of the Horsa, and the steamer proceeded, at slow speed, towing the boats, parallel with the shore, for about fifteen minutes, when a light was seen in the distance. The Captain told the pilot about the light, the pilot asked to have the tow line cast off, the line was cut, and the boats drifted away from sight.

The night was intensely dark. When the men got into the boats and the boats were cast loose, the Horsa was far out at sea, and was more than six miles from the coast of Cuba. The witnesses for the Government testified (pp. 13, 15, 16, 19) that they could not see Cuba, and could not see land. What afterward became of the boats

or the men and articles in them has never been known or ascertained, and the Government made no attempt to prove that either the boats or the men or the articles in the boats ever reached the Island of Cuba.

The boxes that remained on board the *Horsa* were unopened and not being entered on the ship's manifest (p. 27), were by order of the Captain thrown overboard, to avoid the trouble which that reason would arise with the Custom House Officers in Port Antonio, and the consequent seizure and detention of the steamer. On the arrival of the *Horsa* at Port Antonio, the Custom House Officers made a thorough search of the *Horsa*, but failed to find any irregularity. On the following day, at the request of the fireman Emil Fredericksen, the Custom House Officers made another search and found, lying openly in the fore-castle, a small canvas bag containing a few cartridges; but after investigation, the Captain and steamer were released from detention.

When the *Horsa* returned to Philadelphia, the fireman Emil Fredericksen made a statement to the Spanish Consul in that City with the result that the Spanish Consul, on November 28th, 1895, swore out a warrant for the arrest of the Captain and two of the Mates, on the charge of providing the means for a military expedition from the United States to the Island of Cuba against the King of Spain with whom the United States was at peace; the charge was heard before United States Commissioner Samuel Bell on November 29th, 1895, and the defendants below were held on such charge, and entered bail to answer at the February Session, 1896, of the District Court of the United States at Philadelphia.

Emil Fredericksen took charge of the case and the procuring and fixing up the witnesses. He and three other firemen were witnesses for the Government. At the trial he testified (p. 21), "my wages were \$25 a month; some time last November I went to the Spanish Consul; I went over to New York and hunted up the barge and tugboat, and the witnesses, and brought the witnesses here; I took charge of this case; I started it; I caught it; I picked it up; I fixed the thing up; I saw the witnesses and fixed it up; I am not an American citizen; I have declared my intentions and want to become a citizen of the United States; I am a Dane; Denmark has some islands down in the West Indies; when the *Horsa* was a Spanish Steamer down in those Danish Islands I won't keep quiet or say that was all right; I would not have the Spaniards do anything against my country, and don't want a Dane to go against Spain; I get \$17 a week, I get no money cash in Pinkerton's office, down on Chestnut Street." The other three firemen were taken in charge by the Spanish Consul and although their wages as firemen were only \$25 per month, yet from November 29th, 1895, till February 26th, 1896, they received from the Spanish Consul \$2 per day and their board, besides receiving from the United States the usual fees for witnesses.

The case was called for trial on February 25th, 1896. Eleven witnesses were called and examined on behalf of the Government. Two of the witnesses, Arthur B. Hazlet and Frederick C. Lee, were from New York; Arthur B. Hazlet was a guest, and Frederick C. Lee was the engineer, on board the steam lighter Stranahan, and they were called to prove the transfer of the men and boxes from the Stranahan to the Horsa off Barnegat. Three of the witnesses, Joel Ridgway, Albanus Falkenberg and Clarence Crammer, were from Barnegat; they were connected with the light-house and life-saving station at Barnegat, and were called to prove that they saw a steamer off shore at Barnegat and a lighter go alongside of her; they gave the distance of the steamer from the shore as over three miles. Two of the witnesses, H. C. B. Murray and Jabez Bowen were Custom House Officers at Port Antonio, Jamaica, and were brought to Philadelphia and kept there till the trial to prove
8 the finding of the small canvas bag with cartridges in the fore-castle of the Horsa when she arrived at Port Antonio, and also that they noticed some alteration in the painting of the funnel of the steamer and had her name painted over on her sides. The other four witnesses were Emil Fredericksen, Carl Arnston, Oscar Svensen and Ludwig G. Jensen, who were four of the firemen on the Horsa, and were called to prove what they saw and heard on the steamer.

Five witnesses were called and examined on behalf of the defendant. Three of them, Edward W. Paxis, Herbert P. Ker and Frederick Svanoë, were called to prove that machetes were knives used for agriculture and domestic purposes, and were usually worn by nearly every working man and boy in Cuba and the West India islands. The other two witnesses, Charles Bitholm who was the third engineer on the Horsa, and Dorothea Nelson who was the wife of the chief engineer and was a passenger on the Horsa, were called to prove what they saw and heard, and to disprove some of the facts testified to by the firemen. The defendant, J. H. S. Wiborg, who was captain of the steamer, also testified in his own behalf.

The case was argued before the jury by the District Attorney and his Assistant for the Government, and by the Counsel for the Defendant. The jury were charged upon the law and upon the facts by the Judge, Honorable William Butler. On February 26th, 1896, the jury rendered a verdict of guilty. A motion and reasons for a new trial were filed. At the same time a motion in arrest of judgment was filed, averring the want of jurisdiction of the Court. The several motions for a new trial and in arrest of judgment were argued and overruled and dismissed. On March 17th, 1896, sentence was passed upon the defendants. The defendant, J. H. S. Wiborg was sentenced to pay a fine of three hundred dollars and to imprisonment in the Eastern Penitentiary of the Commonwealth of Pennsylvania for the term of one year and four
9 calendar months, and to pay the costs of prosecution. The

defendants, Jens P. Petersen and Hans Johansen, who were masters of the steamer, were sentenced to pay a fine of one hundred dollars and to imprisonment in the Philadelphia County Prison for a term of eight calendar months, and to pay the costs of prosecution; but afterwards, at the request of their counsel, their sentence was reconsidered, and they were sentenced to pay a fine of one hundred dollars and to imprisonment in the Eastern Penitentiary of the Commonwealth of Pennsylvania for the term of one year, and pay the costs of prosecution. A petition on behalf of the said defendants was presented to Honorable George Shiras, Jr., Associate Justice of the Supreme Court of the United States, praying for a writ of error or appeal, and the said admission of the defendants to bail pending the hearing of said writ, which petition was granted and the defendants have given and entered bail pending the hearing of the writ of error aforesaid.

Assignments of error have been filed, relating to the want of jurisdiction of the Court, the admission of hearsay evidence, errors in the charge of the Court upon the law and upon the facts, the refusal of the Court to read some of the defendant's points of law to the jury, and to either affirm or refuse the same, the definition given by the Court as to what constitutes a military expedition, the expression of the personal opinion of the Court upon the evidence, the introduction of, and charge upon, matters and facts not contained in the evidence, in overruling the motion for a new trial, in dismissing the motion in arrest of judgment, and imposing sentences upon the defendants.

10

2. *Analysis of the Government's Testimony.*

Transferred to the Horsa on the High Seas.

That the Horsa was more than three miles off the shore of Barnegat, when the men and what they had with them were transferred from the steam lighter Stranahan, was conceded. The testimony is as follows:

Frederick C. Lee, (p. 9), engineer of the steam lighter Stranahan: "She was anchored, I should judge, about four or five miles off shore. I think they can anchor there probably as much as ten miles off shore."

Joel Ridgway, (p. 10), Captain of the Life Saving Station. "She was not less than three miles off from shore."

Albanus Falkenburg, (p. 10), one of the life saving crew. "I do not suppose she was any shorter than three miles off. The vessel might have been more than three miles from shore."

Clarence Cranmer, (p. 11), Keeper of the Barnegat Light. "The steamer was about three miles out, not any shorter."

Left the Horsa on the High Seas.

That when the boats were lowered, and the men got into them with their boxes and baggage, and the tow-line from the Horsa was

cast off, the Island of Cuba was not in sight, was also conceded. What afterward became of the men or the boats or what was in the boats was not known and was not shown. The testimony is as follows:

Carl Arnston, (p. 13), fireman. "It was raining, and we could not see Cuba after we got the men in the boats."

Oscar Svensen, (p. 15), fireman. "I did not know it was Cuba, because I did not see any land."

Ludwig G. Jansen, (p. 16), fireman. "The night was dark as pitch. I don't know how far we were from land. I couldn't see land."

11 Emil Fredericksen, (p. 19), fireman. "We did not touch at Cuba; we passed it so that we could not see it."

Government's Evidence of a Military Expedition.

The only evidence of what the men did, what they said, or what took place, to show that it was a military expedition, is as follows:

Frederick C. Lee, (p. 9), engineer of the Stranahan: "There was put aboard quite a number of cases, boxes of different kinds, different sizes, and different shapes."

Carl Arnston, (p. 11), fireman. "The boxes were put between decks; they were big and small boxes. I saw a big box there, about eight feet long, that had some wheels in it; the wheels were about four feet. I saw the muzzle or bore of a cannon; it was about six inches. The men hoisted the big box with a steam engine, and put it between decks. The men stayed on the vessel between decks. The men opened all the boxes; I saw them open one of them, the one that had the cannon in it; I can't tell how many they opened; I saw about twelve or thirteen boxes opened. I saw them take guns out of two boxes; they were guns and rifles; there was a short gun and a big one; they did not have any bayonets that I saw. Each man had a gun; they were doing nothing with the guns that I saw; they were not drilling that I saw; they did not have any soldier clothes on; they had a belt around here; they had swords about four feet long; I saw some of the men have belts with machetes in them. They broke the big boxes open and took small boxes out of them; then they broke the small boxes, too, and took some guns and rifles out—guns and swords; the swords were about that size (indicating). The guns were distributed among the men; each man got a rifle and each man got a sword. The men did nothing that I saw in marching or drilling or anything of that kind. They did not have a commander aboard, as I can

12 say. Only they had a big cannon on board, and they fired once with that; they just placed the cannon in the middle of the ship; it was a big cannon, about five feet long, on wheels; they fired the cannon once; that is all I saw. It was night when the men got off. I do not know how far we were from Cuba. We

could not see Cuba after the men got in the boats. I heard forty-eight boxes were thrown overboard; I saw the boxes but did not count them; somebody told me it was forty-eight; they were small boxes."

Oscar Svensen, (p. 14), fireman. "I was on deck several times and saw several boxes opened there, and in one of those boxes I specially saw was one machine cannon. I heard them shoot from that cannon, and went on deck to see what it was, and saw the smoke of it, that is all, and saw a man standing there talking; I talked some language, it was Spanish or some other language that I did not understand. I heard one of these men tell me he got down to Cuba, fight the Spanish; and they had these knives, they called them in Spanish machetes; they were knives and revolvers; the knives they hanged in a belt; they hang in a scabbard; I did not take much notice of them; they carried them in belts; I do not know that they were what they usually call a sword, such as office carry. I saw some of these men have rifles. I saw two or three men were drilling and had some exercise; but I did not understand what they were talking about; I understood it was exercise, because he was talking to them and had different movements, and then he lifted the rifles up, so I could understand that there was some exercise; it was only once." And, (p. 15), "These fellows had some belts around them to put some cartridges in, and they had some boxes that they took out of the big ones. Two men were sitting there, and one said to me, "these are going to kill a hundred Spanish with them," as much as I could understand. They took out

13 different small boxes; they opened them and took some cartridges out of them and put them in their belts. The chief gave them some canvas, and they made small bags that they carried these cartridges in." And, (p. 16), "All that I saw them doing on the vessel was they had rifles and cartridges, and saw three men had some exercise one day there with the rifles; two of them were standing in line, and the third one gave them exercise. I don't know what the rest were doing. I only saw them exercising once. I saw the cannon; all I can say it was about five or six feet long and about half a foot in diameter; the wheels were about three or four feet. I did not see anybody firing a cannon or but I heard it all right; I went right up so that I could see the smoke, too; I heard it only once. When we came down to Cuba I did not know it was Cuba, because I did not see any land."

Ludwig G. Jansen, (p. 16), fireman. "There were between thirty and forty men, and just as many boxes. When we came into smooth water they got some canvas and sewed some small bags to put cartridges in; you know what they have over their shoulders. They opened the boxes and took out all the rifles and gave each man one rifle; the men said there was 150 spare rifles after each man had got one; those were put into blankets; there was a big bale of blankets came aboard too, at the same time; all the rifles were

wrapped up in blankets in small bundles, five in each, I guess, or something like that. The men didn't seem to keep a secret of where they were going or what they were going to do, they told plainly that they were going down to fight the Spaniards. Each man was given a rifle, and a sword or machete, I think; it was not a sword that they used here, nor that any soldier used that I ever saw before; it was a sharp cutting instrument of some kind. Some of them had belts, and others hadn't. There was three kinds of car-

tridges and two kinds of rifles; there was small Winchesters
 14 for the cavalrymen and other big rifles for the infantry; that's what they told me. I know from the boxes they opened that there were four kinds of cartridges, one for the machine gun. The man in charge of the gun told me that was a Maxime repeat firing gun or something like that. I saw it worked and I saw them practising on it, and he showed me how they were doing it. I saw them when they fired a shot. I heard it was a French Canadian who had charge of the gun. It was a small light gun about four feet or four and a half. One day they were going to practice with the machine gun, and were going to open the boxes to get cartridges for the guns; in one case there was a wrong mark; I think they were talking Spanish; they opened the wrong box; they opened a box with medicines and bandages in it. The man in charge of the gun drilled with his men; I should think he had about six or seven men; he put every one of them in their right places; I did not see any other drilling done aboard the ship—no other. I heard that every one that had a revolver was an officer, and they had different kinds of swords, more like the swords they use here. There was one that seemed to be in command of them; they called him Captain or something like that; he was an old man; he was said to be the man in command of the forty or fifty men. The small boxes were taken out of the big boxes that came aboard; they were cartridges, I was told, for the Winchester rifles. I saw six men at drill at one time, drilling with the guns; the only drilling was amidships; the gun was not pointed over the side. I saw the man drilling with that gun once, in the daytime. The men were all going around the deck like ourselves, walking and lying around, and some sitting around. For each man I saw a rifle, because they always carried them around the deck; they were walking around the deck with rifles. None of them had any bayonets. I

know they were rifles by looking at the outside of them. I
 15 never handled a Winchester. I don't know anything more than they told me. I do not speak Spanish; they talked to me in English; I should think more than half of them or about half of them, spoke English; some of them were brought up in this Country, and some were born Americans. They took away with them all the boxes they could get into the boats. They did not throw any boxes overboard; they left them there for the crew to throw them over." .

Emil Fredericksen, (p. 19), fireman. "Aboard the steam lighter was about thirty or forty men and thirty or forty boxes of different sizes. They came aboard. On the way down, after we left Barnegat Light, the men emptied the boxes. There was a big one with a cannon in it; that was the only one. The were others smaller, with two wheels. In the other boxes there were rifles—larger and shorter rifles—two sizes of rifles; they put them in blankets. I saw the men drilling on their way down. I saw the cannon put upon a wheel and something put underneath, so that the cannon could stand up; one man was standing behind and two standing there, and the officers had spoken only English were standing there. They were drilling, one was cleaning with some arrangement with the ammunition. They were only playing that—drilling. I did not see them make use of the rifles. They lost one rifle overboard. There was a man to look after the gear. There was a young fellow looking a little sick of it. I says, 'what's the matter with you.' He says, 'I don't care to go down there.' I says, 'what did you went for.' 'Oh, well,' he says, 'my father and mother was Cubans, and talked a long time to me, so I went.' The Cubans called one of these men Captain; I don't know what he was, he only spoke the English language. About eight o'clock he says, 'well, when it comes—the gun boat here—will you men help us to fight.' He said that about two hours before they went into the boats. He said, 'will you fight
16 when there comes a Spanish gun boat.' He said that to me. 'We'll give you a rifle each.' Well, I say, 'I don't care.' He was the same man that drilled with a cannon. He was talking the English language. He did not speak Cuban himself, and had to get a man to speak for him. He was the man who had charge of the cannon. The cannon had wooden wheels with a ring around, and a little iron wheel—three wheels. It wasn't so heavy; I should think two or three men could carry it easily. There were six or eight officers, but there was only one man that they called officer. The Cubans called him Captain. I don't know whether he was a Captain or not. I did not see the men drilling with the rifles. None of the men had soldier clothes on. We did not touch at Cuba; we passed it so that we could not see it. The whole party of men and boxes left in the boats."

The men had no military appearance.

Frederick C. Lee, (p. 10), engineer of the Stranahan.

"They were dressed the same as other people."

Oscar Svensen, (p. 16), fireman. "They dressed like you and me when they came on board."

Emil Fredericksen, (p. 21), fireman. "None of the men had soldier clothes on."

There was no military organization or leadership.

The only testimony that in any way relates to organization or leadership of any kind among the men, is as follows:

Frederick C. Lee, (p. 9), engineer of the Stranahan.

"Before we left King Street there was put aboard quite a number of cases, boxes of different kinds, different sizes and different shapes.

There seemed to be a man in charge of it. I heard him called
17 'Doctor.' It was done in quite an open way. They did not seem to be afraid of anything."

Carl Arnston, (p. 11), fireman. "They did not have a commander aboard, as I can say. I heard the sailors tell it that the man who seemed to be in charge of the gun was a French grenadier."

Ludwig G. Jansen, (p. 17), fireman. "There was one that seemed to be in command of them. They called him Captain, or something like that. He was an old man. He was said to be the man in command of the forty or fifty men."

Emil Fredericksen, (p. 25), fireman. "They called one of these men Captain; I don't know what he was. He was the same man that drilled with the cannon. He was talking the English language; he could not speak Cuban himself, and had to get a man to speak for him. There was a man to look after the gear."

What was said by the Men.

The only conversation between the Government's witnesses and the men on the Horsa, to show who the men were, where they were from, where they were going, or what their object or purpose was, is as follows:

Frederick C. Lee, (p. 10), engineer of the Stranahan. "There were two young men in the engine room there with me, and I asked them where they were going, and they said they were going to Cuba. They did not say what they were going to do. That is all the conversation I had with any of them."

Carl Arnston, (p. 12), fireman. "I was going in the forecastle one night, and he told me, 'I go down to Cuba to fight,' to fight the Spanish. I just asked him how much the Captain got out of it for bringing them down, and he said, 'he gets twelve thousand dollars for it.' I talked with only one."

18 Oscar Svensen, (p. 14), fireman. "I heard one of these men tell me he go down to Cuba, fight the Spanish." And (p. 15), "two men were sitting there, and one of them said to me, 'these is going to kill a hundred Spanish with them,' as much as I could understand."

Ludwig G. Jansen, (p. 17), fireman. "The men didn't seem to keep a secret of where they were going, nor what they were going to do, so they told plainly that they were going down to fight the Spaniards. I don't know anything more than they told me. I do not speak Spanish. They talked to me in English. I should think more than half of them, or about half of them, spoke English. Some of them were brought up in this Country, and some of them were born Americans." *

Emil Fredericksen, (p. 20), fireman. "About half of the passengers could speak the English language. There was a young

fellow looking a little sick of it. I says, 'what's the matter with you.' He says, 'I don't care to go down there.' I says, 'What did you went for.' 'Oh, well,' he says, 'my father and mother was Cubans, and talked for a long time to me, so I went.' The Cubans called one of these men Captain; I don't know what he was. About two hours before they went into the boats, he says, 'will you fight when there comes a Spanish gun boat; we'll give you a rifle each.' Well, I says, 'I don't care.' He was the same man that drilled with the cannon. He was talking in the English language. He did not speak Cuban himself, and had to get a man to speak for him."

19

3. *Testimony for the Defence.*

Government's Witness Contradicted.

Charles Vitholm, (p. 24), third engineer. "I saw some men on deck, about twenty, all around the deck. Some of the men had guns in their hands, and some put them on the hatches and anywhere. It was about from ten to twenty guns that I saw. Some had guns and some had none. The men were not drilling; if they had been drilling I would have seen them sure. Some of the guns were rifles—double barrellled rifles we would call them at home. I saw a cannon on board; it was about three feet high. I did not see or hear that cannon fired off. If it had been fired I would have heard it. The ship was a small ship and I must have heard it. The men that I saw on deck were not dressed as soldiers. Some of them had knives—machetes; they are banana knives, for cutting grass and to cut bananas."

Dorothea Nelson, (p. 23), wife of the chief engineer, and a passenger on the Horsa. "I was on deck most of the day. I saw men on the ship differing from the crew and officers; about fifteen or twenty men. Some of them had guns; I did not notice how many, but I saw from ten to twelve at one time; the men were dressed like the crew of the ship; they had all kinds of clothing on; they were not dressed like soldiers; some of them had belts. I did not see any drilling at any time. I saw a cannon on board, about three feet high and three feet long. I did not hear the cannon fired during all the time I was on the vessel. It could not be fired without my hearing it."

Testimony of Captain Wiborg.

20 "Before sailing (p. 25), I received a message, which was, after I passed the breakwater to proceed North near Barnegat and wait further orders. I stopped off Barnegat, between four and five miles off shore, as near as I can judge, and anchored. A tug or lighter came to us; in the tug were a lot of men; there was a man brought me a message from John D. Hart Company. It was in writing. He told me to take those men and luggage and whatever they had aboard the Horsa and let them off whenever they called for it to be let off. The boats that I had shipped in Philadelphia were cleared for Port Antonio, Jamaica, and the first intention

was to deliver them at Port Antonio. The order was, they had a colored man there that they called the pilot, and whenever he called for them to be let off I should let them off and give them the boats. The men walked through the port on the between decks; the ship had three decks; the between deck was the second deck of the ship. They had a lot of boxes and their luggage, and they were stored away on the between deck. The boxes were of different sizes; the largest was about six feet long; there was no block or tackle used in hoisting them up; they were all lifted aboard; a tackle was used to hoist the boats aboard. The men got off about six miles off the Cuban coast. The colored man that they called the pilot came and told me to let them off. I stopped the steamer and lowered the boats in the water. The men got off through the ports. They took their boxes with them, not all of them, but the biggest part of them. They did not have enough boats. At first they had four boats, and I sold a boat to them. It was not my boat, it belonged to the owners of the ship. The boats were lowered aft and they were all tied to each other at the stern. I towed them about fifteen or twenty minutes along shore, and I saw them leave the ship."

"When the men came aboard they had not the appearance of soldiers. When I started from Philadelphia I did not know that we were going to take these people and their goods on the
21 Horsa. According to my opinion I had no right to refuse to take them. My charter called for me to go wherever the charterer sends me between the St. Lawrence River and the River Platte."

"Nobody was carrying guns when they got on my boat. Some of the men on the ship had guns. I do not know where they got them. I saw about half a dozen. It did not attract my attention because the men had guns. I have often seen passengers carrying guns aboard my ship. I have gone to Africa and to Cuba and Savannah and different ports; on the African expedition they had about 150 guns. I did not see the men drilled. I saw the cannon, but did not examine it; it did not attract my attention because it was a small gun, a cannon about the same size as the ship's cannon, say about three and a half feet long. I did not notice it at first. I did not know it was my own or theirs when I first saw it; when I first saw it I thought it was my own. That cannon was not fired on board. I slept in the chart room and the cannon was standing right in front of it; I did not hear it fired. I did not see any of the boxes broken open, and did not know that the boxes were broken open and arms taken out. Some of them had machetes; I saw plenty of them before; they would not attract my attention. When the men got in the boats the men had their guns and their machetes. Some of them had guns and some had not."

"When (p. 28) I was taking the men and their boxes on board, I did not know there was anything wrong in it. I did not suppose there was anything wrong in it. I do not know where they went to.

I do not know whether they went to Cuba or not; all I know is I left them out at sea, about six miles off the coast. None of the men told me they were going to Cuba. The pilot did not tell me where he was going. I did not talk to him, but he could talk very little English. I did not think there was anything wrong about it,

22 I did not think it was of any consequence that my vessel was boarded on the high seas by a tug, by a lot of men with boxes and things; that did not strike me as particularly important."

By THE COURT:

Q. And that did not strike you as an unusual or uncommon thing?

A. No, sir; that did not strike me as anything unusual.

Q. That they should be let off wherever they asked to be let off and take the boats with them; that indicated that they were to be let off at sea somewhere, did it not?

A. Yes, sir; it did.

Q. Did it not strike you as unusual that these men were to be taken on board and turned out on the sea with the boats?

A. No; it did not.

By MR. INGHAM:

Q. Have you ever had an experience of that kind before in your whole life as a navigator?

A. Yes; I have had it on the coast in Jamaica and Cuba.

Q. Have you ever had an order to receive a number of men and boxes on the high seas and let them off whenever they wanted to get off?

A. Not boxes, but I have had them on the coast in Jamaica; when they got on the boat, and whenever they wanted to be let off I let them off before.

"I have before taken people down to the Island of Cuba and landed them, not at a port, but at some other place. It is the custom down in that place, among those islands, for people to come in boats on the vessel and to pile their goods on the vessel; they might pay the agent for it; they did not pay me anything; they go in that way from port to port. I have been into different ports in Cuba and went from there along the coast and picked up fruit along the coast; they are not clearing ports, and when people come on board they were taken to other places on the island; there is nothing unusual or uncommon in it."

23 "I did not get any extra compensation myself. I will swear to that. I do swear that I neither directly or indirectly get a greater compensation than usual on account of this trip of the Ninth of November of last year."

The Case Against the Mates.

Captain Wiborg testified, (p. 28), "These men (pointing to the two Mates who are defendants) had nothing to do with this ship or with

this business. They listened to my orders. They were under my orders. I was the Master of that vessel. I am responsible for all that was done."

The above is the only evidence that in any way relates to the Mates, excepting the testimony of Ludwig G. Jansen, (p. 22), that these defendants were two of the Mates of the vessel on that voyage.

4. *Assignment of Errors.*

1. The Court below erred in overruling the objection of the defendants to the testimony of Frederick C. Lee given in the form of questions and answers, and admitting as evidence the said testimony of the said Frederick C. Lee, who was a witness for the prosecution, and who was engineer on the steam-lighter Stranahan, the said testimony being in relation to a conversation on the Stranahan between the witness and two persons who had been taken off the tug Cham by the Stranahan, and were being conveyed by the Stranahan to the defendants' ship Horsa; the questions, answers and testimony being as follows:

Q. Did you have a conversation with some of these young men you took off the Cham and they told you they were Cubans?

A. Yes, sir.

Q. Did they tell you where they were going?

(Objected to, as to anything that was said or took place on the boat in the absence of the defendants.)

(Objection overruled. Exceptions by defendants.)

24 A. Yes, there were two young men in the engine room there with me, and I asked them where they were going, and they told me they were going to Cuba.

2. The Court below erred in overruling the objection of the defendants to the testimony of Carl Arnston, a witness for the prosecution, who was a fireman on the defendants' steamer Horsa, the said testimony being in relation to a conversation on the steamer Horsa after leaving Barnegat and during the course of the voyage, between the witness and one of the persons on board the Horsa, the questions, answers and testimonies being as follows:

Q. Did you have any talk with any of these men?

(Objected to, unless it was in the presence of these defendants. Objection overruled. Exception by defendants.)

Q. You say you had a conversation with them?

A. Yes, sir.

Q. Tell us what they told you?

A. I was going to the fore-castle one night, and he told us, "I go down to Cuba to fight."

Q. To fight who?

A. The Spanish.

Q. How many men did you talk with?

A. Only one.

3. The Court below erred in charging the jury as follows:

"For the purposes of this case it is sufficient to say that any combination of men organized here to go to Cuba to make war upon its Government, provided with arms and ammunition, we being at peace with Cuba, constitutes a military expedition. It is not necessary that the men shall be drilled, put in uniform, or prepared for efficient service; nor that they shall have been organized as

25 or according to the tactics or rules which relate to what is known as infantry, artillery or cavalry; it is sufficient that

they shall have combined and organized here to go there and make war on the foreign Government, and have provided themselves with the means of doing so. I say provided themselves with the means of doing so because the evidence here shows that the men were so provided. Whether such provision, as by arming, etc., is necessary need not be decided in this case. I will say, however, to counsel, that where that question required to be decided, I should hold that it is not necessary; nor is it important that they intended to make war as an independent body or in connection with others."

4. The Court below erred in not reading to the jury all of the defendants' third point, and erred in not affirming the said point, the said point being as follows:

"3. That it is no offense against the laws of the United States to transport persons intending to enlist in foreign armies, and arms and munitions of war, on the same ship; that in such case the persons transported, and the shipper and transporter of the arms, run the risk of seizure and capture by the foreign power against whom the arms were to be used, and against whom the persons and passengers intended to enlist; but such cause did not constitute an offense against the laws of the United States, and for such cause the defendants cannot be found guilty."

The answer to the said point being as follows:

"This is true, provided the persons referred to herein had not combined and organized themselves in this country to go to Cuba and there make war on the Government. If they had so combined and organized and yet intended when they reached Cuba to join the insurgent army and thus enlist in its service, and the arms were

26 taken along for their use, they would constitute a military expedition, as before described, and the transportation of such body of persons from this country, for such a purpose, would be an offense against the statute."

5. The Court below erred in not reading to the jury, and either affirming or refusing the defendants' fourth point, which is as follows:

"4. That the laws of the United States, and the Section under which the defendants are indicted, do not prohibit transporting of arms or of military equipments to a foreign country, or forbid one or more individuals, singly or in unarmed association, from leaving the United States for the purpose of joining in any military

operations which are being carried on between other countries or between different parties in the same country."

6. The court below erred in not reading to the jury, and either affirming or refusing the defendants' fifth point, which is as follows:

"5. That before the jury can find the defendants guilty under this indictment, they must first find that there was a "military expedition or enterprise" against the territory of the King of Spain. A military expedition or enterprise does not exist unless there is a military organization of some kind designated as infantry, cavalry or artillery, and officered and equipped for active hostile operations."

7. The court below erred in not reading to the jury, and either affirming or refusing the defendants' sixth point, which is as follows:

"That if the jury find that there were transported on board of the *Horsa* arms and men, but the same were not a military organization as infantry, cavalry or artillery, and officered and
27 equipped, or in readiness to be officered and equipped, then the jury must find the defendants not guilty."

8. The Court below erred in not reading to the jury, and either affirming or refusing the defendants' seventh point, which is as follows:

"7. That it is not an offense against the laws of the United States for a shipper to ship arms to a foreign country, or for volunteers to go to a foreign country for the purpose of joining in military operations which are being carried on between other countries or between different parties in the same country; in such cases the shipper and volunteer would run the risk, the one of the capture of his property and the other of the capture of his person by the foreign power; but the master of the ship transporting such arms and volunteers, not being a military expedition or enterprise, would not commit any offense against the laws of the United States, and would not be liable under this indictment."

9. The court below erred in not reading to the jury, and either affirming or refusing the defendants' eighth point, which is as follows:

"That if the jury finds from the evidence in this case, that the officers of the steamship *Horsa* took on board, off the coast of New Jersey, on the high seas, a number of men; all dressed as citizens, without arms and equipments on their persons, and at the same time took on board certain boxes of arms and ammunition and munitions of war, but that the said men were not organized as infantry, cavalry or artillery, or ready for such organization, the jury
28 are instructed that they must find the defendants not guilty, even if the jury believe that the passengers on board intended to enlist, on arrival in Cuba, in the Cuban army."

10. The Court below erred in not reading to the jury, and either affirming or refusing the defendants' ninth point, which is as follows:

"9. That if the jury find, from the evidence, that the defendants

took on board their vessel, off the New Jersey coast, a number of men, unarmed, and not organized either as infantry, cavalry or artillery, and at the same time took on board boxes of ammunition and arms, the jury are instructed that they must find the defendants not guilty, even if the jury should believe that the men intended upon arrival in Cuba to enlist in the Cuban army, and that the boxes of arms were intended for use in the Cuban army."

11. The Court below erred in charging the jury, in answer to the defendants' twelfth point, as follows:

"I instruct you that if the only aid furnished the vessel, being a foreign vessel, was so beyond our jurisdiction, they did not commit an offense, and must consequently be acquitted. They allege that the point off Barnegat where the men were taken on board was not within three miles of our shore. If this be true, and the defendants did not start from our shore under an agreement to provide the means for transporting and to transport the men, but were ignorant of the object of going to Barnegat until they reached there, they cannot be convicted. If, however, they entered into an arrangement here to furnish and provide the means of transportation, and provided it, they are guilty, if this was a military expedition, although the men were not taken aboard and the transportation did not commence until the ship anchored off Barnegat."

29 12. The Court below erred in charging the jury as follows:

"The evidence justifies the conclusion that the men were principally Cubans. They came on board the vessel in a body, and appeared to be acting in concert under an organization or understanding of some description. They were armed, having rifles and cannon, and were provided with ammunition and other supplies. Some of them who were able to speak English declared that they were Cubans going to Cuba to fight the Spanish, and if these men were in combination to do an unlawful act what was said by any of them at the time in carrying out their purpose was evidence against them all as to the nature of the expedition."

13. The Court below erred in charging the jury as follows:

"That this was a military expedition, designed to make war against the Government of Spain, would seem to the Court to be free from reasonable doubt."

14. The Court below erred in charging the jury as follows:

"Thus you see what the defendants did; from this and any other testimony bearing on this subject you must determine whether they understood what the expedition and its object were, and had arranged and provided for its transportation when they left Philadelphia, or left our shores within the three mile limit stated. If they were ignorant on this subject until they anchored off Barnegat Light, the point being according to the testimony beyond the jurisdictional limits of the United States, no offense was committed, as I have before stated, against the laws of this country. The question, therefore, is, did the defendants understand they were to carry this expedition, and had provided for it, and un-

derstand what the expedition was before leaving here. As you have seen, they took on two extra boats before starting, and cleared for Point Antonio, and turned off of their course at the breakwater, the Captain explaining this, to which explanation you will give whatever weight you deem it to be worth."

15. The Court below erred in charging the jury as follows:

"The Captain says he was ignorant of the service required of him until he reached the point near Barnegat. You must judge whether he should be believed or not, and from all the evidence must determine whether the defendants left here with the knowledge of and provision for what they were about to do."

16. The Court below erred in charging the jury as follows:

"We are suffering to-day, as probably no other people suffers, from lawlessness, from mobs, lynch law, murder, violation of trusts, as the result of want of faithfulness in executing the law."

17. The Court below erred in overruling the defendants' motion in arrest of judgment, and the reasons therefor, which reasons are as follows:

"1. Because this Court has no jurisdiction over these defendants, or to pass or impose sentence upon these defendants.

"2. Because although the indictment charges that these defendants committed an indictable offense within the jurisdiction of this Court, yet the uncontradicted testimony shows, that the defendants are subjects of the King of Denmark, that they were in charge of a Danish vessel, that the men and boxes were taken on board the said vessel on the high seas, beyond the three mile limit, and beyond the jurisdiction of the Courts of the United States of America, and no overt act or offense, as charged in the said indictment, was committed by the defendants or either of them within the jurisdiction of this Court or any other Court in the said United States of America, and therefore this Court is without jurisdiction to try these defendants or to impose sentence upon them."

18. The Court below erred in overruling the defendants' motion in arrest of judgment.

19. The Court below erred in passing sentence upon the defendants.

20. The Court below erred in sentencing the defendants to confinement in the penitentiary.

32

5. *Argument.*

Assignments of error nine, ten and eleven relate to the jurisdiction of the Court. The undisputed evidence was, that the *Horsa* was a foreign vessel sailing under the flag of Denmark; that she was chartered and employed by the J. D. Hart Company of Philadelphia in the lawful business of carrying freight and merchandise to and from Philadelphia; that she left Philadelphia under her charter, with a cargo, lawfully cleared from that port, bound for the Island of Jamaica; that before sailing her captain received orders

from the charterer to proceed north near Barnegat and await further orders; that after leaving Philadelphia she was anchored at a point in the ocean more than three miles from the shore at Barnegat; that the boxes were taken on board the steam lighter Stranahan at Brooklyn, in New York; that the men were taken on board the Stranahan, after she left New York bay, at some place off the coast of New Jersey; and that the men and boxes, under orders from the charterer, were transferred from the Stranahan to the Horsa at the place where the Horsa was anchored off Barnegat. The Court, in the eighth, ninth and twelfth points of law presented on behalf of the defendants, was asked to charge and instruct the jury, that under the evidence, the transportation of the men and boxes, and taking them on board the Horsa, were not acts performed within the jurisdiction of the Court, that the defendants did not commit any offence within the jurisdiction of the Court, and that the jury must find the defendants no guilty. The indictment contained only a single count, charging that the defendants "at the Port of Philadelphia, Pennsylvania, within the jurisdiction of the Court, did begin, set on foot, and provide and prepare the means for a certain military expedition and enterprise to be carried on from thence against the territory and dominions of a foreign prince, to
33 wit, against the Island of Cuba," etc. There was no conspiracy count or charge in the indictment. The Court stated the issue to be (p. 37) the charge of "providing the means for or aiding such military expedition by furnishing transportation for the men, their arms, baggage, etc." The Court did not read to the jury either the eighth or the ninth points; but in answer to the twelfth point, charged and instructed the jury:

"I instruct you that if the only aid furnished the vessel, being a foreign vessel, was so beyond our jurisdiction, they did not commit an offence, and must consequently be acquitted. They allege that the point off Barnegat where the men were taken on board was not within three miles of our shore. If this is true, and the defendants did not start from our shore under an agreement to provide the means for transporting and to transport the men, but were ignorant of the object of going to Barnegat until they reached there, they cannot be convicted. If, however, they entered into an arrangement here to furnish and provide the means of transportation, and provided it, they are guilty, if this was a military expedition, although the men were not taken aboard and the transportation did not commence until the ship anchored off Barnegat."

Assignment of error seventeen should also be considered in this connection. It relates to the Court overruling and dismissing the motion in arrest of judgment, the motion averring the want of jurisdiction of the Court.

It is contended, that merely furnishing transportation, or transporting the men with their boxes and baggage from one place to another, would not be the criminal act or offence of "providing and

preparing the means for a military expedition," described in and prohibited by section 5286, under which the defendants are indicted; and even if it were, no offence would have been committed, and no criminal act would have been performed, until the transportation had actually commenced.

34 If the men and boxes constituted a military expedition, taking them from New York would be an overt act that would not be within the jurisdiction of the Court in Philadelphia; nor would taking the men on board a foreign vessel out on the ocean be an act performed within the jurisdiction of the Court in Philadelphia. To enter into an "agreement," or enter into an "arrangement," in Philadelphia, to "furnish and provide the means of transportation," is not made an indictable offence under section 5286; and even if an agreement or arrangement were entered into in Philadelphia, and the transportation was to be from another place, beyond the jurisdiction of the Court, the Court within whose jurisdiction the overt act was performed would alone have jurisdiction to try the persons performing the act. This is the law as laid down in the text-books, and has not been changed by any decision that has been found.

"The rule in misdemeanors is, that all who participate in them whether present or absent, are indictable in the County in which they are committed." 1 Bishop on Criminal Procedure, Sec. 57.

The same principle is laid down and illustrated in Wharton's American Criminal Law, Vol. 1, Sec. 604.

Assignments of error one, two and twelve relate to the Court admitting, as evidence against the defendants, alleged conversations between the men who were taken on board the *Horsa* and the witnesses for the Government, and statements of the men not made in the presence of the defendants. The indictment charges that it was a military expedition against the Island of Cuba. The only evidence to show that the men were going to Cuba was the testimony given by the engineer of the lighter *Stranahan* and the four firemen of the *Horsa*, of conversations between those witnesses and the men on board the vessels, and statements made by the men, not one of which conversations and statements took place or were made in the presence of the defendants, or either of them.

35 If those conversations and statements had been ruled out by the court, as they should have been, the defendants would necessarily have been acquitted. The Court not only admitted the testimony, but charged and instructed the jury (p. 39) as follows:

"Some of them who were able to speak English declared that they were Cubans going to fight the Spanish, and if these men were in combination to do an unlawful act what was said by any of them at the time in carrying out their purpose was evidence against them all as to the nature of the expedition."

It is respectfully contended that the learned Judge erred not only in his statement of the law, but seriously erred in his statement of

facts. The testimony shows that more than half of the men spoke the English language, and there is not a line nor a sentence in the entire testimony that shows or indicates that even one of the men stated that he was a Cuban. The evidence was hearsay, it should not have been admitted, and it was error on the part of the Court to instruct the jury to regard it.

Declarations by third persons in reference to the offence with which the defendants are charged are hearsay, and consequently inadmissible in evidence. Hence, evidence of what a living though absent witness testified in the former trial is inadmissible. Wharton's American Criminal Laws, sec. 662.

In conspiracy, a foundation must first be laid by proof sufficient in the opinion of the Judge to establish *prima facie* the fact of conspiracy between the parties, or proper to be laid before the jury as tending to establish such facts. The connection of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy, in pursuance of the original concerted plan, and with reference to the common object, 36 is in contemplation of law, the act and declaration of them all, and is, therefore, original evidence against each of them. When conversations are proved, the effect of the evidence will depend on the other circumstances, such as the fact and degree of the prisoner's attention to it, and assent or disapproval. 1 Greenleaf on Evidence, sec. 111.

The general rule of law rejects all hearsay reports of transactions, whether verbal or written, given by persons not produced as witnesses. 1 Greenleaf on Evidence, sec. 124.

The language used by the learned Judge in his charge to the jury is identical with that set forth in Greenleaf on Evidence in relation to conspiracies. The defendants were not indicted for a conspiracy, and the rules of evidence in conspiracies did not apply in their case.

Assignments of error five, six, seven, eight, nine and ten relate to the Court not reading to the jury, and either affirming or refusing, the fourth, fifth, sixth, seventh, eighth and ninth points of law presented on behalf of the defendants. The learned Judge mentioned the points in their numerical order, and said, "are fully answered by what has been said." All that had been previously said by the learned Judge was in definition of a military expedition, and did not relate to the particular points of law upon which the Court was requested to charge the jury. The sixth, eighth and ninth points related to the want of jurisdiction of the Court, and had not been previously commented upon, and were not in the subsequent part of the charge referred to or answered. The defendants were deprived of the benefit and advantage that might have been derived by them

by the points having been read to the jury, and properly considered by the Court.

37 Assignments of error three, four, twelve and thirteenth relate to the definition given by the learned Judge of a military expedition, and the charge and comments upon the same.

Assignment of error thirteen relates particularly to the charge and instruction of the Court upon the evidence, which was, "that this was a military expedition, designed to make war against the Government of Spain, would seem to the Court to be free from reasonable doubt." It will be remembered that the only evidence that it was a military expedition was contained in the testimony of the four firemen, and that the only evidence that the men were going to Cuba was contained in the testimony of the engineer of the Stranahan and the four firemen of the Horsa, of conversations with the men that were taken on board the Horsa. It will also be remembered that it was not known what became of the men or boats after they left the Horsa, and no attempt was made to prove that they ever reached the Island of Cuba. It is true that the Court added, "The question, however, is one for your determination alone, and I submit it to you as such, reminding you that the responsibility of deciding it rests upon you only," and concluded the charge with the remarkable assertion (p. 41), "We are suffering to-day as probably no other people suffers from lawlessness, from mobs, lynch law, murder, violation of trusts, as the result of want of faithfulness in executing the law."

The learned Judge gave the jury his definition of a military expedition, and instructed them that such was the law. He gave them his opinion that the facts showed it was a military expedition to make war against the Government of Spain, and instructed them that it was free from a reasonable doubt, which the jury were bound to accept as the law. He reminded them that the responsibility of deciding the case according to his instructions rested upon
38 them, and informed them of the suffering our people were undergoing from the want of faithfulness in executing the law.

There was no evidence whatever to show that our people were suffering from lawlessness, from mobs, lynch law, murder, or violation of trusts. The defendants were entitled to a fair and dispassionate charge that would leave the minds of the jury free to decide the issue solely upon the law and the evidence. The language of the Court was a command coupled with a threat.

Assignments of error fourteen and fifteen relate to the charge of the Court concerning the facts, whether the defendants understood what the expedition and its object were, and had arranged and provided for its transportation when they left Philadelphia, and the explanation given by the Captain.

The learned Judge charged, "The Captain says he was ignorant of the service required of him until he reached the point near Barnegat; you must judge whether he should be believed or not,

and from all the evidence must determine whether the defendants left here with the knowledge of and provision for what they were about to do." The Captain stated that he was ignorant of the service required of him, and there was no contradiction of his testimony. The Government did not prove or attempt to prove that the Captain or either of the other defendants had any knowledge of what they were going to Barnegat for. The Captain's testimony stood alone, and there was no other evidence for the jury to consider. The charge of the Court for the jury to give the Captain's evidence "whatever weight you deem it to be worth," and "you must judge whether he should be believed or not," amounted to a direction to the jury to doubt the testimony of the Captain where no doubt should have arisen, and was an indirect intimation to the jury that the testimony should not be believed. A doubt, if any existed, should arise from the evidence, and not in the mind of the Court

39 or the jury. If there were any evidence which the jury should consider in connection with that of the Captain, the

Court should have called the attention of the jury to the particular evidence to be considered, and not confine the criticisms and instructions to the testimony of the Captain alone. In the case of the Mates, there was no evidence whatever to show that they had anything to do with the transaction other than the fact that they were employed as Mates on board the Horsa, and it will be remembered that the Captain testified that the Mates had nothing to do with the matter, that they were under his instructions, and that he alone was responsible.

Assignment of error sixteen relates to the charge to the jury as follows: "We are suffering to-day, as probably no other people suffers, from lawlessness, from mobs, lynch law, murder, violation of trusts, as the result of want of faithfulness in executing the law." There was no evidence of any of the facts stated by the Court. There was no reference made to them in any way during the trial. They were matters and facts introduced by the Court alone, at the end of the charge, coupled with an earnestness, impressiveness and gesture that could not fail to impress the jury most unfavorably against the defendants.

It is protested on behalf of the defendants that the learned Judge had no right or authority to charge and instruct the jury as above, and that the charge and instructions did them great injustice.

Assignments of error seventeen and eighteen relate to the Court overruling and dismissing their motion in arrest of judgment, the motion averring the want of jurisdiction on the part of the Court.

40 The offence, if any, was not committed within the jurisdiction of the Court. The indictment averred that the offence was committed within the jurisdiction of the Court. To the indictment the defendants entered a plea of not guilty. The

want of jurisdiction did not appear until the evidence was taken, and the evidence showed that the men and boxes were taken on board the *Horsa*, a foreign vessel, on the ocean and beyond the three mile limit from the shore.

Assignments of error nineteen and twenty relate to the passing of sentence upon the defendants, and in sentencing the defendants to be confined in the penitentiary.

Section 5286 provides, "Every person who, * * * shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years." The imprisonment mentioned in the section is simple imprisonment, and does not warrant the infliction of infamous punishment. Confinement in the penitentiary is an infamous punishment.

Section 5541 provides, "In every case where any person convicted of any offence against the United States is sentenced to imprisonment for a period longer than one year, the Court by which the sentence is passed may order the same to be executed in any State jail or penitentiary within the district or State where such court is held, the use of which jail or penitentiary is allowed by the Legislature of the State for that purpose."

Under the laws of the State of Pennsylvania, prisoners convicted in the court where the defendants were convicted can be confined either in the county prison or in the penitentiary.

After conviction, Captain Wiborg was sentenced to imprisonment in the Eastern Penitentiary of the Commonwealth of Pennsylvania for the term of one year and four calendar months; and the Mates were sentenced to imprisonment in the Philadelphia County Prison for the term of eight calendar months. Afterward in order

41 that they might not be separated, the counsel for Jens P.

Petersen and Hans Johansen stated to the Court that those defendants would prefer to take a sentence for a longer time and go to the penitentiary, whereupon the Court sentenced them to imprisonment in the Eastern Penitentiary of the Commonwealth of Pennsylvania for the term of one year. The counsel for the defendants protested to the Court that the Court had no authority to sentence any of the defendants to the penitentiary, but the Court claimed the right to pass the sentence, and sentenced the defendants accordingly.

It is contended that as the Legislature of the Commonwealth of Pennsylvania has given the Court the right to sentence the defendants to the Philadelphia County Prison, that the Court has no right or authority to sentence the defendants or either of them to confinement in the Eastern Penitentiary.

WILLIAM W. KER,
W. HALLETT PHILLIPS,
For Plaintiffs in Error.

1 Supreme Court of the United States, October Term, 1895.

J. H. S. WIBORG, JENS P. PETERSEN, and HANS JOHANSEN, Plaintiffs in Error, vs. THE UNITED STATES.	}	No. 986.
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In error to the District Court of the United States for the Eastern District of Pennsylvania.

[May 25, 1896.]

Wiborg, the captain, and Petersen and Johansen, the mates, of the steamer Horsa, were indicted in the District Court of the United States for the Eastern District of Pennsylvania, under section 5286 of the Revised Statutes. The indictment charged that defendants, "mariners, at the district aforesaid and within the jurisdiction of this court, did, within the territory and jurisdiction of the United States, to wit, at the port of Philadelphia, Pennsylvania, within the district aforesaid, begin, set on foot, and provide and prepare the means for a certain military expedition and enterprise to be carried on from thence against the territory and dominions of a foreign prince, to wit, against the Island of Cuba, the said Island of Cuba being then and there the territory and dominions of the King of Spain, the said United States being then and there at peace with the King of Spain, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America." They were tried before Judge Butler and a jury, and convicted. Motions in arrest of judgment and for a new trial were severally made and overruled, and defendants were sentenced to pay fines and to serve terms in the State penitentiary. This writ of error was thereupon sued out and defendants admitted to bail.

The Horsa was a Danish steamer, sailing under the Danish flag, and defendant Wiborg, its captain, was a subject of the King of Denmark, as were also his co-defendants, as claimed by their counsel.

The Horsa was engaged in the fruit business for John D. Hart & Company, of Philadelphia, and on November 9, 1895, cleared from Philadelphia for Port Antonio, Jamaica. She had on board but little cargo, consisting of two life-boats, a lot of empty boxes and barrels, two horses, some horse feed, bales of hay and boxes of corn, all of which were entered on her manifest. Just before sailing, Captain Wiborg received a message (in writing but not produced), which, he said, was: "After I passed the Breakwater to proceed north near Barnegat and await further orders." The Horsa sailed between six and seven P. M., and, after passing the Delaware Breakwater, her proper course would be southward. She turned, however, to the northward, went up the Jersey coast to Barnegat light and

anchored on the high seas between three and four miles off the shore. Between ten and eleven the same evening the steam lighter J. S. T. Stranahan sailed from Brooklyn, carrying some cases of goods and two life-boats, which had been put on board by the crew of the lighter during the evening. On the lower bay of New York, below Staten Island, during the night she took on board between thirty and forty passengers, mostly dark-complexioned men speaking a foreign language, apparently Cubans or Spaniards. The lighter then ran down to Barnegat, where she saw the Horsa under a white flag. She also ran up a white flag, went alongside, and put aboard her passengers with the cases of goods and the life-boats.

2 They brought authority in writing from John D. Hart & Co., which was not produced. Captain Wiborg saw the transfer made, and assented to it. His firemen complaining, he answered: "I told them if anybody had to hang for this I would be the man to hang for it." He testified that the man on the lighter brought him a message from John D. Hart & Company. "He told me to take those men and luggage and whatever they had aboard the Horsa, and let them off whenever they called for it to be let off. I shipped two boats at the same time, and the order of my message was to deliver those two boats to those men and the two boats that I had shipped here in Philadelphia. . . . The only order was they had a colored man there that they called the pilot, and whenever he called for them to be let off I should let them off and give them the boats." As to the boats taken on at Philadelphia and those taken on off Barnegat, he was "to deliver them to these men as soon as they called for them. . . . The pilot did not tell me where he was going. I did talk to him, but he could talk very little English." The captain testified that the writing from J. D. Hart & Co., "to take whatever was in the tug, the men and their luggage and boxes, and let them off whenever they called for it to be let off," did not strike him as an unusual thing; it did not strike him as unusual "that these men were to be taken on board and turned out on the sea with the boats." It appeared and was admitted that there was an insurrection in Cuba. The captain was informed that the party was going to Cuba, and believed the men were going to fight for Cuba, but was careful to ask no questions, and testified that he considered his own part in the affair to be lawful. The charter party was not produced.

After boarding the Horsa, these persons broke open the boxes which they had brought with them, and took out rifles, swords and machetes, and one cannon. They also had cartridge belts, medicines, and bandages with them. They were not in uniform, but there was evidence that some of them had caps with a little flag, which they said was a Cuban flag. They brought their own food with them. The evidence tended to show that when these men divided up the arms, every man had a rifle; that certain of them, understood to be officers, had swords and revolvers; that one seemed

to be in command of them ; and that this commander asked some of the crew whether they would fight if attacked by a Spanish gun-boat. There was also some evidence that there were military exercises in the nature of drilling by from three to seven men at a time ; that these persons stated that they were going to Cuba to fight the Spaniards ; that on the second day out they made small canvas bags to put cartridges in, and unpacked a bale of blankets which they had brought with them, wrapped one hundred and fifty spare rifles in these blankets in small bundles, about five in each, and threw the boxes overboard in which the rifles had come, taking a rifle, sword and machete apiece, and practicing with them and the cannon. There were three kinds of cartridges and two kinds of rifles. One witness stated that, as he was informed by them, there were small Winchesters for the cavalry and big rifles for the infantry ; big revolvers for the officers ; and that the cannon was a Maxim gun, in charge of a French Canadian. This machine gun was worked with a slot and a crank, and had its own cartridges. The witness saw it worked, and saw them practicing with it, and the man in charge showed him how they were doing it. Some testimony was introduced on behalf of defendants to the effect that a machete is generally carried by the inhabitants of the West Indies, and has many peaceful uses. One of the defendants' witnesses admitted that it was a formidable weapon, and, moreover, that he had never seen citizens carry guns in Cuba. It is unquestioned

3 that the machete is used for both war and peace, it being described in the Century Dictionary as a "heavy knife or cutlass, used among Spanish colonists and Spanish-American countries, both as a tool and as a weapon," and by Webster as "a large, heavy knife, resembling a broadsword, often two or three feet in length, used by the inhabitants of Spanish America as a hatchet to cut their way through thickets, and for various other purposes."

After leaving Barnegat, the Horsa took the usual course for Jamaica, which follows the Cuban coast for about six hours. The usual color of her funnel was yellow below with red above and black on top, and it was so painted when she left Philadelphia. While she was at sea the funnel was repainted red and black, and when she returned to Philadelphia it was black, red and yellow. The name of the Horsa was painted out amidships, but her name was on the stern in brass letters and on the bow, and those letters were not painted over to the captain's knowledge. About six miles off the coast of Cuba the colored pilot gave orders to disembark. This was about eleven o'clock at night, and the disembarkation was conducted under the supervision of Captain Wiborg, who had the lights of the vessel put out. The two boats were launched which had come on board at Philadelphia and also those which had come with the lighter, and Captain Wiborg sold the men one of the ship's boats. As one of the boats leaked, another was lowered from the ship. The passengers took to the boats, taking with them all the

ammunition and arms they could carry. The steamer then undertook to tow the boats, but a strange light was seen in the distance, and at the request of the men the captain cut the boats loose and started away at full speed. Some forty boxes of cartridges had been left on the Horsa because there was no room for them on the boats, and Captain Wiborg directed that these should be thrown overboard. He said this was to avoid getting into trouble at Port Antonio, since the boxes were not manifested for that port. The Horsa then completed her voyage to Port Antonio. The captain said he told the collector there he had lost two boats, "to put him off his guard."

Defendant's counsel requested the court to give to the jury thirteen points of instructions, of which the fourth, fifth, sixth, seventh, eighth, ninth and eleventh were as follows:

"4. That the laws of the United States and the section under which the defendants are indicted do not prohibit transporting of arms or of military equipments to a foreign country or forbid one or more individuals, singly or in unarmed association, from leaving the United States for the purpose of joining in any military operations which are being carried on between other countries or between different parties in the same country.

"5. That before the jury can find the defendants guilty under this indictment they must first find that there was a 'military expedition or enterprise' against the territory of the King of Spain. A military expedition or enterprise does not exist unless there is a military organization of some kind designated as infantry, cavalry, or artillery, and officered and equipped for active hostile operations.

"6. That if the jury find that there were transported on board of the 'Horsa' arms and men, but the same were not a 'military organization as infantry, cavalry, or artillery, and officered and equipped, or in readiness to be officered and equipped,' then the jury must find the defendants not guilty.

"7. That it is not an offense against the laws of the United States for a shipper to ship arms to a foreign country or for volunteers to go to a foreign country for the purpose of joining in military operations which are being carried on between other countries or between different parties in the same country; in such cases the shipper and volunteer would run the risk, the one of capture of his property,

and the other of the capture of his person by the foreign power; but the master of the ship transporting such arms and volunteers, not being a military expedition or enterprise, would not commit any offense against the laws of the United States and would not be liable under this indictment.

"8. That if the jury find from the evidence in this case that the officers of the steamship Horsa took on board, off the coast of New Jersey, on the high seas, a number of men, all dressed as citizens, without arms and equipments on their persons, and at the same time took on board certain boxes of arms and ammunition and

munitions of war, but that the said men were not organized as infantry, cavalry, or artillery or ready for such organization, the jury are instructed that they must find the defendants not guilty, even if the jury believe that the passengers on board intended to enlist, on arrival in Cuba, in the Cuban army.

"9. That if the jury find from the evidence that the defendants took on board their vessel, off the New Jersey coast, a number of men, unarmed and not organized, either as infantry, cavalry, or artillery, and at the same time took on board boxes of ammunition and arms, the jury are instructed that they must find the defendants not guilty, even if the jury should believe that the men intended upon arrival in Cuba to enlist in the Cuban army, and that the boxes of arms were intended for use in the Cuban army."

"11. That if the jury find from the evidence that the passengers and boxes of arms did not constitute a military expedition or enterprise, but that the said passengers were simply going to Cuba to enlist in either army, and the said arms and ammunition were being conveyed to Cuba to be used by either army, then the jury are instructed that the defendants in transporting them in due course of their business committed no offense against the laws of the United States; and the jury are further instructed that all evidence of secrecy, such as taking on the passengers and boxes of arms on the high seas and putting out the lights off the coast of Cuba, were acts which the defendants might lawfully do to avoid the capture of the passengers and the capture of the property from off their ship by Spanish men-of-war; but under such circumstances, if the jury find there was no military expedition or enterprise, such acts would not of themselves be evidence of any intent to violate the statute of the United States under which the defendants are indicted."

The court charged the jury, explaining the indictment, and then continued as follows:

"The evidence heard would not justify a conviction of anything more than providing the means for or aiding such military expedition by furnishing transportation for the men, their arms, baggage, &c. To convict them, you must be fully satisfied by the evidence that a military expedition was organized in this country, to be carried out as and with the object charged in the indictment, and that the defendants, with knowledge of this, provided means for its assistance and assisted it as before stated.

"Thus you observe the case presents two questions: First, was such military expedition organized here in the United States? Secondly, did the defendants render the assistance stated here with knowledge of the facts?

"In passing on the first question, it is necessary to understand what constitutes a military expedition, within the meaning of the statute. For the purposes of this case, it is sufficient to say that any combination of men organized here to go to Cuba to make war upon its government, provided with arms and ammunition, we being at

peace with Cuba, constitutes a military expedition. It is not necessary that the men shall be drilled, put in uniforms, or prepared for efficient service, nor that they shall have been organized as, or according to the tactics or rules which relate to, what is known as infantry, artillery, or cavalry. It is sufficient that they shall have combined and organized here to go there and make war on the foreign government, and have provided themselves with the means of doing so. I say 'provided themselves with the means of doing so,' because the evidence here shows that the men were so provided. Whether such provision, as by arming, &c., is necessary need not be decided in this case. I will say, however, to counsel that were that question required to be decided, I should hold that it is not necessary.

5 "Nor is it important that they intended to make war as an independent body or in connection with others. Where men go without combination and organization to enlist as individuals in a foreign army, they do not constitute such military expedition, and the fact that the vessel carrying them might carry arms as merchandise would not be important."

Taking up defendants' thirteen points, the court disposed of them as follows:

"1. It is not a crime or offense against the United States, under the neutrality laws of this country, for individuals to leave this country with intent to enlist in foreign military service, nor is it an offense against the United States to transport persons out of this country and to land them in foreign countries when such persons have an intention to enlist in foreign armies."

"As a general proposition this is true, and the point is affirmed.

"2. It is no offense against the laws of the United States to transport arms, ammunition, and munitions of war from this country to any other foreign country, whether they are to be used in war or not; that in such case the shipper and transporter of the arms, ammunition, and munitions of war only run the risk of the capture and seizure of such arms and contraband of war by the foreign power against whom they are intended to be used; but this does not make it an offense against the laws of the United States, and for such cause the defendants cannot be held guilty."

"This is also true. No military expedition would exist in such case.

"3. That it is no offense against the laws of the United States to transport persons intending to enlist in foreign armies, and arms and munitions of war on the same ship; that in such case the persons transported and the shipper and transporter of the arms run the risk of seizure and capture by the foreign power against whom the arms were to be used and against whom the persons and passengers intended to enlist; but such cause did not constitute an offense against the laws of the United States, and for such cause the defendants cannot be found guilty."

"This is true, provided the persons referred to herein had not combined and organized themselves in this country to go to Cuba and there make war on the government. If they had so combined and organized, and yet intended when they reached Cuba to join the insurgent army and thus enlist in its service, and the arms were taken along for their use, they would constitute a military expedition, as before described, and the transportation of such body of persons from this country for such a purpose would be an offense against the statute.

"The fourth, fifth, sixth, seventh, eighth, and ninth points are fully answered by what has been said.

"10. Even if the jury do find that the men taken on board were an organized military force with officers, as infantry, cavalry, or artillery, the jury cannot find the defendants guilty unless the jury also find that the defendants knew that they were such a military organization as infantry, cavalry, or artillery, constituting a military expedition or enterprise against the kingdom of Spain."

"As before stated, to justify conviction of the defendants, the jury must be fully satisfied that the defendants knew that the men constituted a military expedition such as I have described.

"The eleventh point has been fully answered by what the court has said.

"The twelfth point is a very important point, and is as follows :

"12. If the jury find that when the defendants left Philadelphia and until after they had passed beyond the jurisdiction of the United States, they were ignorant of the fact that they were to transport the men in question, with their arms and provisions, and find that the point off Barnegat where the men in question were taken aboard was beyond the jurisdiction of the United States—in other words, beyond the three-mile limit—and find that the vessel was sailing under a Danish flag, then and in that case they will find the defendants not guilty."

"This point raises the question whether the defendants committed an offense against the statute, if the only aid which they furnished the expedition was furnished out at sea beyond the jurisdiction of this country; and I instruct you that if the only aid furnished the vessel, being a foreign vessel, was so beyond our jurisdiction they did not commit an offense, and must consequently be acquitted. They allege that the point off Barnegat where the men were taken on board was not within three miles of our shore. If this is true, and the defendants did not start from our shore under an agreement to provide the means for transporting and to transport the men, but were ignorant of the object of going to Barnegat until they reached there, they can not be convicted.

"If, however, they entered into an arrangement here to furnish and provide the means of transportation, and provided it, they are guilty, if this was a military expedition, although the men were not taken

aboard and the transportation did not commence until the ship anchored off Barnegat.

“‘13. It is the duty of the government to satisfy the jury beyond a reasonable doubt that the men and arms and ammunition taken on board the steamship Horsa was a military expedition or enterprise from the United States against the kingdom of Spain, and also that the defendants knew or shut their eyes to the fact that it was a military expedition or enterprise from the United States against the kingdom of Spain; and if the jury have from the testimony any reasonable doubt upon either of these questions or facts, the jury will find the defendants not guilty.’

“This point is affirmed. I trust the jury understand it. To convict the defendants it is necessary that the government shall have satisfied your minds beyond a reasonable doubt that this was a military enterprise, and that the defendants when they started knew it. Otherwise they are not guilty.”

The court then further recapitulated and commented on the evidence, and, in the course of doing so, said:

“Some of them who were able to speak English declared that they were Cubans going to Cuba to fight the Spanish; and if these men were in combination to do an unlawful act, what was said by any of them at the time in carrying out their purpose was evidence against them all as to the nature of the expedition. . . .

“That this was a military expedition designed to make war against the government of Spain would seem to the court to be free from reasonable doubt. The question, however, is one for your determination alone, and I submit it to you as such, reminding you that the responsibility of deciding it rests upon you only. If you find that this was not a military expedition, or, rather, if you are not fully satisfied that it was, your verdict will be for the defendants, without going further. If, on the other hand, you find that it was a military expedition intended to make war against the government of Cuba, then you must pass upon the second question stated, to wit, Did the defendants, with knowledge of the facts, aid in carrying out its purpose in going to Cuba? They transported the men with their arms, ammunition, and provisions. Did they enter upon this service here with the knowledge of the fact that the men constituted a military expedition, to fight against the government of Cuba? . . . From this and any other testimony bearing on this subject you must determine whether they understood what the expedition and its objects were, and had arranged and provided for its transportation when they left Philadelphia or left our shores within the three mile limit stated. If they were ignorant on this subject until they anchored off Barnegat light, the point being according to the testimony beyond the jurisdictional limits of the United States, no offense was committed, as I have before stated, against the laws of this country.

"The question, therefore, is, Did the defendants understand they were to carry this expedition, and had provided for it and understand what the expedition was before leaving here? As you have seen, they took on two extra boats before leaving, and cleared for Port Antonio, Jamaica, and turned off of their course at the Breakwater (the captain explaining this, to which explanation you will give whatever weight you deem it to be worth). When the men came to the ship off of Barnegat, there is no evidence that the captain or any one of the defendants expressed or exhibited any surprise. It was then manifest that the service required was to carry men and arms to Cuba (the captain says he then so understood it), a most hazardous undertaking. Is it probable that the defendant

7 defendant would have risked themselves and their ship in this service if they had not been prepared for it by previous arrangement, and have done it without demurring or hesitating? Again, is it likely that those in charge of the expedition would have risked bringing the men and the property to that point on the mere chance that the defendants would take the risk of carrying them and the property to Cuba without arranging for it beforehand? If the defendants had refused, as it was their right to refuse, and it would seem certain or at least extremely probable that they would refuse this most hazardous service if previous arrangement had not been made, what would have been the situation of the men and the property? The expedition would have failed. The men would have been subject to arrest, and the property to sacrifice. Is it probable that those in charge of such an enterprise would take the men and property to this point, without having secured certain means of transportation for it in advance? The captain says he was ignorant of the service required of him until he reached the point near Barnegat. You must judge whether he should be believed or not, and from all the evidence must determine whether the defendants left here with knowledge of and provision for what they were about to do.

"I now submit the case to you, reminding you of its importance. If the evidence of the defendants' guilt is not entirely clear, they should be acquitted. If it is thus clear, they should certainly be convicted. No sympathy or prejudice must be allowed to influence your mind in passing on this case. We have nothing to do with the controversies between the people of Cuba and the government of that island. We are concerned only with the execution of the law in this case. We have only to consider whether the statute to which your attention has been called has been violated. It is our duty to see that the law is honestly and justly executed; that is all. The peace and safety of the community so manifestly depend upon the faithful and honest administration of the law, that no man can fail to see it. We are suffering to-day, as probably no other people suffers, from lawlessness, from mobs, lynch law, murder, violation of trusts, as the result of want of faithfulness in executing the law.

"You will take the case and decide it with a careful regard to the rights of the defendants." 73 Fed. Rep. 159.

No motion or request was made that the jury be instructed to find for defendants or either of them.

Defendants excepted "to that part of the charge of the court giving the definition of a military expedition;" to the refusal of the court "to read the points that were not read to the jury," "to affirm all the points without qualification," and "to affirm each point without qualification;" to "the statement of the court that in its opinion this was a military expedition;" and "that the men were armed;" to "the failure of the court to comment on the evidence on behalf of the defendants;" to the statements "of the court in reference to the reasons, motives, purposes, and acts of the defendants;" "that the defendants did not express surprise that the men came on the vessel off Barnegat;" and "that the declarations of the men on the ship to the witnesses for the government were evidence against the defendants;" also to the statements "that even if an agreement to furnish and provide the means of transportation was made within the jurisdiction of the United States to carry on a military expedition which was not consummated until they got outside of the three-mile limit, that constituted an offense against the laws of the United States;" and "that the acts and declarations of the Cubans themselves were evidence against them all as to the nature of the expedition."

The motion in arrest was based on the alleged want of jurisdiction of the court. Errors were assigned to the giving, refusing and qualification of instruction; to the admission in evidence of declarations of some of the party, during the voyage, as to their destination; and to the overruling of defendants' motion in arrest of judgment for want of jurisdiction.

8 Mr. Chief Justice FULLER delivered the opinion of the Court:

Title LXVII of the Revised Statutes, headed "Neutrality," embraces eleven sections, from 5281 to 5291, inclusive. Section 5281 prohibits the acceptance of commissions from a foreign power by citizens of the United States within our territory to serve against any sovereign with whom we are at peace. Section 5282 prohibits any person from enlisting in this country as a soldier in the service of any foreign power and from hiring or retaining any other person to enlist or to go abroad for the purpose of enlisting. Section 5283 deals with fitting out and arming vessels in this country in favor of one foreign power as against another foreign power with which we are at peace. Section 5284 prohibits citizens from the fitting out or arming without the United States, of vessels to cruise against citizens of the United States; and section 5285, the augmenting of the force of a foreign vessel of war serving against a friendly sovereign. Sections 5287 to 5290 provide for the enforcement of the

preceding sections, and section 5291, that the provisions set forth shall not be construed to prevent the enlistment of certain foreign citizens of the United States.

Section 5286 is as follows :

"Every person who, within the territory or jurisdiction of the United States, begins, or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years."

This section was originally section five of an act approved June 5, 1794, (1 Stat. 381, c. 50,) carried forward as section six of an act of April 20, 1818, (3 Stat. 347, c. 88,) and differs therefrom in no respect material here. The language of the section closely follows the recommendation of President Washington in his annual address December 3, 1793, when he said: "Where individuals shall . . . enter upon military expeditions or enterprises within the jurisdiction of the United States . . . these offenses cannot receive too early and close an attention, and require prompt and decisive remedies." Annals 1793-95, p. 11. The legislation is historically considered in Dana's Wheaton, § 439, note. The statute was undoubtedly designed in general to secure neutrality in wars between two other nations, or between contending parties recognized as belligerents, but its operation is not generally dependent on the existence of such state of belligerency. 13 Op. Atty. Gen. 177, 178. Section 5286 defines certain offenses against the United States and denounces the punishment therefor, but, although a penal statute, it must be reasonably construed, and not so as to defeat the obvious intention of the legislature. *United States v. Lacher*, 134 U. S. 624, 628.

The offense is defined disjunctively as committed by every person who, within our territory or jurisdiction, "begins *or* sets on foot, *or* provides *or* prepares the means for, any military expedition *or* enterprise, to be carried on from thence."

This indictment charged that defendants did "begin, set on foot, and provide *and* prepare the means for a certain military expedition *and* enterprise."

Defendants' counsel did not seek to compel an election, nor in any manner, by their motion in arrest or otherwise, to raise the question of duplicity, nor do they now make objections to the proceedings on this ground. The District Judge instructed the jury that the evidence would not justify a conviction "of anything
9 more than providing the means for or aiding such military expedition by furnishing transportation for their men, their arms, baggage," &c. Under these circumstances, the verdict cannot be disturbed on the ground that more than one offense was

included in the same count of the indictment, but it must be applied to the offense to which the jury were confined by the court. *Crain v. United States*, 162 U. S. —.

We think that it does not admit of serious question that providing or preparing the means of transportation for such a military expedition or enterprise as is referred to in the statute is one of the forms of provision or preparation therein denounced. Nor can there be any doubt that a hostile expedition dispatched from our ports is within the words "carried on from thence." The officers of the *Horsa* were concerned in providing the means of transportation.

1. The first and main question in the present case is whether the trial judge erred in his instructions to the jury in respect of what constitutes a "military expedition or enterprise" under the statute. The question is one of municipal law, and the writers on international law afford but little aid in its solution. They deal principally with the status of belligerents, and the rights and obligations of neutral nations when the existence of such a status is formally recognized or accepted as existing *de facto*.

Calvo defines a military expedition as being an armed enterprise against a country, and he gives the expedition of Xerxes as an illustration. *Dict. de Droit Int. verbo, Expedition Militaire*.

Professor Lawrence (*Prin. Int. Law*, 1895, p. 508) is quoted by counsel to the effect that, to constitute a warlike expedition, "it must go forth with a present purpose of engaging in hostilities; it must be under military or naval command; and it must be organized with a view to proximate acts of war. But it need not be in a position to commence fighting the moment it leaves the shelter of neutral territory; nor is it necessary that its individual members should carry with them the arms they hope soon to use. When a belligerent attempts to organize portions of his combatant forces on neutral soil or in neutral waters, he commits thereby a gross offense against the sovereignty of the neutral government, and probably involves it in difficulties with the other belligerent, who suffers in proportion to his success in his unlawful enterprise."

In Hall's *International Law*, § 222, it is said: "In the case of an expedition being organized in and starting from neutral ground, a violation of neutrality may take place without the men of whom it is composed being armed at the moment of leaving. . . . On the other hand, the uncombined elements of an expedition may leave a neutral state in company with one another, provided they are incapable of proximate combination into an organized whole."

Boyd in his edition of *Wheaton's International Law*, § 439 *aa*, says: "It is impossible to lay down any hard and fast line separating commercial transactions in munitions of war, and the organizing of hostile expeditions. International law is necessarily incapable of being defined and laid down with the precision attainable by municipal law. The question is one of intent, and it is the duty of a neutral government to exercise due diligence in ascertaining what

the real character of the transaction may be. The elements of a hostile expedition are thus described by Professor Bernard: 'If at the time of its departure there be the means of doing any act of war,—if those means, or any of them, have been procured and put together in the neutral port,—and if there be the intention to use them (which may always be taken for granted when they are in the hands of the belligerents), the neutral port may be justly said to serve as a base or point of departure for a hostile expedition.' (Montague Bernard, *Neutrality of Great Britain*, p. 399.)"

10 But this statute is to be construed as other domestic legislation is, and its meaning is to be found in the ordinary meaning of the terms used. The definitions of the lexicographers substantially agree that a military expedition is a journey or voyage by a company or body of persons, having the position or character of soldiers, for a specific warlike purpose; also the body and its outfit; and that a military enterprise is a martial undertaking, involving the idea of a bold, arduous, and hazardous attempt. The word enterprise is somewhat broader than the word expedition; and although the words are synonymously used, it would seem that under the rule that its every word should be presumed to have some force and effect, the word enterprise was employed to give a slightly wider scope to the statute.

The phrase "military expedition or enterprise" has been variously construed by the district courts, but apparent differences in expression may be largely attributable to the differences in the facts under consideration in the particular case.

In *United States v. O'Sullivan*, 2 Whart. Crim. Law. § 2802, note, Judge Judson charged the jury that before they would "convict on this indictment, it must be proved to their satisfaction that the expedition or enterprise was in its character military; or, in other words, it must have been shown by competent proof that the design, the end, the aim, and the purpose of the expedition, or enterprise, was some military service, some attack or invasion of another people or country, state, or colony as a military force . . . But any expedition or enterprise in matters of commerce or of business of a civil nature, unattended by a design of an attack, invasion or conquest, is wholly legal, and is not an expedition or an enterprise within this act. . . . The term 'expedition' is used to signify a march of voyage with martial or hostile intentions. The term 'enterprise' means an undertaking of hazard, an arduous attempt."

Judge Maxey in *United States v. Ybanez*, 52 Fed. Rep. 536, concurred in this view and further said: "This statute does not require any particular number of men to band together to constitute the expedition or enterprise one of a military character. There may be divisions, brigades, and regiments, or there may be companies or squads of men. Mere numbers do not conclusively fix and stamp the character of the expedition as military or otherwise. A few men may be deluded with the belief of their ability to overturn an existing government or empire, and, laboring under such delusion,

they may enter upon the enterprise. . . . The proof must establish in your mind the fact that the expedition or enterprise was of a military character; and when the evidence shows that the end and object were hostile to or forcible against the Republic of Mexico, then it would be, to all intents and purposes, a military expedition. . . . Evidence showing that the end and objects were hostile to or forcible against a nation at peace with the United States characterizes it, to all intents and purposes, as a military expedition or enterprise."

Judge Brawley in *United States v. Hughes*, not yet reported, applied the test suggested by Mr. Hall as to capability of proximate combination of the uncombined elements of an expedition into an organized whole; and he said in reference to the passengers in that case: "But if after they got aboard they took the arms from the boxes, and organized into a company or organization, if they
11 were drilled or went through the manual of arms under the leadership or direction of one man or more, if they themselves became a military organization by reason of such coming together, and of such drilling or instruction, then from that time forth they would be a military organization or enterprise within the meaning of this statute."

In *United States v. Pena*, 69 Fed. Rep. 983, Judge Wales, and in *United States v. Hart*, not yet reported, Judge Brown, of the Southern District of New York, considered the statute as exacting a high degree of organization, but Judge Brown said: "I do not say that in order to constitute a military expedition to be 'carried on from this country,' as the statute reads, it must be complete at the start, or possess all the elements of a military body. It is sufficient if there was a combination by the men for that purpose, with the agreement and the intention of the body that embarked that it should become a military body before reaching the scene of action. Such a combination and agreement, if means for effecting it were provided, followed by embarkation in pursuance of the agreement, would show such a partial execution of the design on our soil, as to bring the case within our statute, as 'a military enterprise begun and carried on from the United States.'"

It is argued that as persons are not prohibited from going abroad for the purpose of enlisting in the service of a foreign army; and as the transportation of arms, ammunition and munitions of war from this country to any other foreign country is not unlawful, 3 Whart. Int. Law Dig. § 388 et seq.; *The Itata*, 15 U. S. App. 1, and authorities cited, therefore no offense was committed in the transportation of these men, the arms and munitions; and reference is made to an opinion of Mr. Secretary Fish on this subject during the Franco-German war of 1870. A statement of that matter is given in Hall's *International Law*, § 222, and in a letter of Sir Edward Thornton to Lord Granville, dated September 26, 1870, 61 State Papers, 1870-71, p. 822, and elsewhere. It seems to have been

an informal communication to the Prussian Minister, who had complained of the fact that the transatlantic steamer Lafayette was carrying a large cargo of arms and ammunitions for sale to the French, while at the same time she was carrying several hundred French passengers, all of whom, as was generally supposed, intended to enlist in the army of France on their arrival. These passengers, however, appear to have been all traveling as individuals without any concert of action, and they had no access to the arms and ammunition any more than an ordinary passenger on an ocean steamer had access to any part of the cargo. Sir Edward Thornton wrote that "Mr. Fish replied to the District Attorney that he was to be guided by the neutrality laws of the United States, and that with regard to the ship it could not be alleged that she was intended for hostile purposes against North Germany. As for the arms and ammunition, they were articles of a legitimate commerce, with which the United States would not interfere, although the vessel might run the risk of being detained by the cruisers of North Germany on her voyage to France."

The District Judge ruled nothing to the contrary and charged the jury in this case that it was not a crime or offense against the United States under the neutrality laws of this country for individuals to leave the country with intent to enlist in foreign military service, nor was it an offense against the United States to transport persons out of this country and to land them in foreign countries when such persons had an intent to enlist in foreign armies; that it was not an offense against the laws of the United States to transport arms, ammunition and munitions of war from this country to any foreign country, whether they were to be
 12 used in war or not; and that it was not an offense against the laws of the United States to transport persons intending to enlist in foreign armies and munitions of war on the same trip. But he said that if the persons referred to had combined and organized in this country to go to Cuba and there make war on the government, and intended when they reached Cuba to join the insurgent army and thus enlist in its service, and the arms were taken along for their use, that would constitute a military expedition, and the transporting of such a body from this country for such a purpose would be an offense against the statute. The judge also charged the jury as follows:

"In passing on the first question, it is necessary to understand what constitutes a military expedition within the meaning of this statute. For the purposes of this case, it is sufficient to say that any combination of men organized here to go to Cuba to make war upon its government, provided with arms and ammunition, we being at peace with Cuba, constitutes a military expedition. It is not necessary that the men shall be drilled, put in uniform, or prepared for efficient service, nor that they shall have been organized as or according to the tactics or rules which relate to what is known as infantry, artillery, or cavalry. It is sufficient that they shall have

combined and organized here to go there and make war on a foreign government, and to have provided themselves with the means of doing so. I say 'provided themselves with the means of doing so,' because the evidence here shows that the men were so provided. Whether such provision, as by arming, and so forth, is necessary need not be decided in this case. I will say, however, to counsel that were that question required to be decided I should hold that it is not necessary.

"Nor is it important that they intended to make war as an independent body or in connection with others. Where men go without combination and organization to enlist as individuals in a foreign army, they do not constitute such military expedition, and the fact that the vessel carrying them might carry arms as merchandise would not be important."

It appears to us that these views of the district judge were correct as applied to the evidence before him. This body of men went on board a tug loaded with arms; were taken by it thirty or forty miles and out to sea; met a steamer outside the three-mile limit by prior arrangement; boarded her with the arms, opened the boxes and distributed the arms among themselves; drilled to some extent; were apparently officered; and then, as preconcerted, disembarked to effect an armed landing on the coast of Cuba. The men and the arms and ammunition came together, the arms and ammunition were under the control of the men; the elements of the expedition were not only "capable of proximate combination into an organized whole," but were combined or in process of combination; there was concert of action; they had their own pilot to the common destination; they landed themselves and their munitions of war together by their own efforts. It may be that they intended to separate when they had reached the insurgent headquarters, but the evidence tended to show that until that time they intended to stand together and defend themselves if necessary. From that evidence the jury had a right to find that this was a military expedition or enterprise under the statute, and we think the court properly instructed them on the subject. This conclusion disposes of most of the errors assigned to the instructions given, qualified, or refused. Some of the points requested on defendants' behalf were incorrect; some were covered by the general charge; and others were properly qualified.

2. The second material question is, whether if a military expedition or enterprise was made out, the court erred in its instructions in respect of defendants' knowledge or notice of the facts. And this involves the jurisdictional question which is raised by the
 13 exception to the qualification of the twelfth point. In that qualification and elsewhere, the district judge specifically and clearly instructed the jury that although this was a military expedition and enterprise, nevertheless the defendants were not criminally responsible unless they were aware of its nature before

they sailed from Philadelphia. "To convict the defendants," said the district judge, "it is necessary that the government shall have satisfied your minds beyond a reasonable doubt that this was a military enterprise, and that the defendants when they started knew it. Otherwise they are not guilty." "The question, therefore, is: Did the defendants understand that they were to carry this expedition, and had provided for it and understand what the expedition was before leaving *here* [Philadelphia]?" It is true that the expedition started in the Southern District of New York, and did not come into immediate contact with defendants at any point within the jurisdiction of the United States as the *Horsa* was a foreign vessel; but the *Horsa's* preparation for sailing and the taking aboard of the two boats at Philadelphia constituted a preparation of means for the expedition or enterprise, and if defendants knew of the enterprise, when they participated in such preparation, then they committed the statutory crime upon American soil, and in the Eastern District of Pennsylvania, where they were indicted and tried.

The jurisdictional point was again presented by the motion in arrest, but its disposition calls for no further observations.

We repeat that on the second material question, namely, whether the defendants aided the expedition with knowledge of the facts, the jury were instructed that they must acquit unless satisfied beyond reasonable doubt that defendants, when they left Philadelphia, had knowledge of the expedition and its objects and had arranged and provided for its transportation. We hold that defendants have no adequate ground of complaint on this branch of the case.

3. An exception was taken to the statement of the court that the men were armed. The court said: "They were armed, having rifles and cannon, and were provided with ammunition and other supplies." This statement was based on uncontradicted testimony, and occurring as it did in a recapitulation of the evidence, no rule of law being incorrectly stated and the matters of fact being specifically submitted to the determination of the jury, we do not regard the exception as tenable. *B. & P. R. R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 574.

4. Objection is also made because the court expressed its opinion that this was a military expedition. But what the court said was that this "would seem to the court to be free from reasonable doubt. The question, however, is one for your determination alone, and I submit it to you as such, reminding you that the responsibility of deciding it rests upon you only. If you find that this was not a military expedition, or, rather, if you are not fully satisfied that it was, your verdict will be for defendants without going further." Clearly the observation of the court thus guarded did not so trespass on the province of the jury as to constitute reversible error. *Simmons v. United States*, 142 U. S. 148, 155.

5. Again, it urged that the court erred, when referring to the captain's testimony that "he was ignorant of the service required

of him until he reached the point near Barnegat;" in saying: "You must judge whether he should be believed or not, and from all the evidence must determine whether the defendants left here with the knowledge of, and provision for, what they were about to do." No exception was taken to this part of the charge; but if there had been, we cannot say that the trial judge was not justified in that remark in view of all the facts and circumstances.

14 Nor was any exception taken to the closing observations by the court as to the importance of faithfulness in the execution of the law, although they are now assigned for error. We see in them nothing which could properly be regarded as prejudicial to the defendants.

6. Other assignments of error relate to the admissibility of declarations of members of the party, during the voyage, as to their destination. One of the witnesses for the prosecution testified on cross-examination "that he had spoken to a couple of those young fellows there, and they said they were going to Cuba." On redirect examination he was asked: "Did they tell you where they were going?" The answer, which was objected to, was: "They told me they were going to Cuba. They did not say what they were going to do." It was uncontroverted in the case that the party meant to go and did go to Cuba, and the evidence was not material. Another witness for the Government was asked: "Q. Did you have any talk with any of those men? Objected to unless it was in the presence of these defendants. Objection overruled. Exception by defendants. A. Yes, sir. I was going in the fore-castle one night and he told us, 'I go down to Cuba to fight.' Q. To fight who? A. The Spanish."

There was no objection to the second question, or to either answer, and no motion to strike out. It does not appear who made the statement or how many persons were present, or that defendants were not present. These assignments are without merit.

There was other evidence of declarations of members of the party as to their purposes, and the district judge in commenting thereon said that: "If these men were in combination to do an unlawful act, what was said by any of them at the time in carrying out their purpose was evidence against them all as to the nature of the expedition," and to this an exception was taken. The general rule was stated in *American Fur Co. v. United States*, 2 Pet. 358, 365, by Mr. Justice Washington, speaking for the court, that "where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties in reference to the common object, and forming a part of the *res gestæ*, may be given in evidence against the others." The declarations must be made in furtherance of the common object, or must constitute a part of the *res gestæ* of acts done in such furtherance. Assuming a secret combination between the party and the captain or officers of the *Horsa* had been proven, then, on the question whether such combination

was lawful or not, the motive and intention, declarations of those engaged in it explanatory of acts done in furtherance of its object came within the general rule and were competent. *St. Clair v. United States*, 154 U. S. 134; *People v. Davis*, 56 N. Y. 102; *Lincoln v. Claffin*, 7 Wall. 132, 139; 1 Greenl. Ev. § 111; *Starkie Ev.* 466.

The extent to which evidence of this kind is admissible is much in the discretion of the trial court, and we do not consider that that discretion was abused in this instance. *Clune v. United States*, 159 U. S. 590, 592.

7. No motion or request was made that the jury be instructed to find for defendants or either of them. Where an exception to a denial of such a motion or request is duly saved, it is open to the court to consider whether there is any evidence to sustain the verdict, though not to pass upon its weight or sufficiency. And although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it.

The Horsa was bound for Jamaica, and her course carried her along the coast of Cuba for about six hours. She took on
15 board at Philadelphia two boats entered on the manifest as for Port Antonio, but intended for and ultimately devoted to the use of the party she transported. The captain received at the wharf written instructions, which he did not produce on the trial, and says he did not keep when he left the vessel, but in accordance with which he went north off Barnegat, anchored outside the three-mile limit, and awaited orders. The inference was not unjustifiable that he was thus and then informed that safety required that whatever was to take place off Barnegat should take place beyond the jurisdiction of the United States, in other words, that a transgression of the laws of the United States was contemplated. The Horsa was boarded on the high seas off Barnegat as heretofore described, and the captain testified that he did not regard the occurrence as anything unusual or important. But the fireman said that they went to the chief engineer, when these men came aboard, and told him they would not go along. "We won't go down there and get shot," "We did not sign for that." The chief engineer bade them keep quiet, and the captain "told them if anybody had to hang for this I would be the man to hang for it. I told them they had better go below and mind their own business." The written instructions the captain there received were not produced, but he said he was to take the men and whatever they had and let them off when told to do so, delivering the two boats shipped at Philadelphia, and the two shipped from the tug to them as soon as called for; and that this did not strike him as singular. The evidence shows that the nature of the enterprise was apparent at this time, and the jury may not unreasonably have inferred that the captain received the men and their arms entered upon the hazards of the voyage, and

quieted the complaints of the fireman, with an equanimity springing from a mind previously made up on the subject. We deem it unnecessary to go over the evidence. We cannot say as matter of law that there was no evidence tending to sustain the verdict against the captain.

But we think the case as to Petersen and Johansen stands on different ground, and that we may properly take notice of what we believe to be a plain error, although it was not duly excepted to. These men were the mates of the vessel, and they proceeded on the voyage under the captain's orders. This would not excuse them if there were proof of guilty knowledge or participation on their part in assisting a military expedition or enterprise when they left Philadelphia. We are of opinion that adequate proof to that effect is not shown by the record, and that as the case stood the jury should have been instructed to acquit them. The captain testified that the mates "had nothing to do with this ship or with its business. They listened to my orders; they were under my orders. I was the master of that vessel. I am responsible for all that was done." The order he received to go north and await orders beyond the three mile limit does not appear to have been communicated to them; and whatever they must have known after the Horsa was boarded off Barnegat, there is nothing sufficiently justifying a presumption of knowledge when the vessel left the wharf.

It is not necessary to enlarge upon the public importance of the neutrality laws. This case is a criminal case arising on an indictment under a section of the Revised Statutes, and we dispose of it on what we deem to be the proper construction of that section, and after subjecting the correctness of the rulings of the court below to that careful examination which the discharge of our duty required.

The judgment against defendant Wiborg is affirmed; the judgment against defendants Petersen and Johansen is reversed, and the cause remanded with instructions to set aside the verdict and grant a new trial as to them.

1 Supreme Court of the United States, October Term, 1895.

J. H. S. WIBORG, JENS P. PETERSEN, and HANS JOHANSEN, Plaintiffs in Error, vs. THE UNITED STATES.	}	No. 986.
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In error to the District Court of the United States for the Eastern
District of Pennsylvania.

[May 25th, 1896.]

Mr. Justice Harlan dissenting:

I concur with my brethren in holding that the judgment against Petersen and Johansen should be reversed, and a new trial ordered as to them.

But I am of opinion that the judgment against Wiborg should also be reversed. It is conceded that the men on the tug were received on board the Horsa at a point off Barnegat which was more than three miles from our shore. It is clear from the evidence that at the time his vessel left Philadelphia, and previous to his receiving those men on board, Wiborg had no knowledge of the purpose for which the charterer ordered him, after he passed the Breakwater, "to proceed north near Barnegat and wait further orders." The movements of the vessel were under the control of the charterer. Wiborg was under no legal obligation to inquire from the charterer why the Horsa was ordered to that point, or what were the orders he was likely to receive after arriving there. His duty was to obey the orders of the charterer, unless such orders obviously contemplated a breach of the laws of this country. The only evidence in the case bearing upon the question whether Wiborg knew, when he left Philadelphia, of any arrangement for his vessel, after it passed beyond the territory and jurisdiction of the United States, to receive men destined for Cuba, was that given by himself. And he distinctly swore that when he started from Philadelphia he did not know that "we were going to take these people and their goods on the Horsa." There was not the slightest ground in the evidence to suppose that he ever had any communication with those people, or that he ever saw them, before they came on his vessel. Those persons had, of course, arranged with the charterer for passage on the Horsa. But the charterer did not communicate the fact of such an arrangement to the captain of the vessel while he was within the territory and jurisdiction of the United States. The direction that he should receive the men and their goods on board came to him, from the charterer, when he was not within the territory or jurisdiction of the United States. He cannot, therefore, be said to have provided or prepared, "within the territory or jurisdiction of the United

States," any means for the expedition or enterprise against the territory or dominion of Spain. Under the interpretation placed upon the statute by the Government, the charterer did provide for such means. But, curiously enough, the charterer was not indicted. The prosecution is against the officers of the vessel, no one of whom, according to the proof, had any knowledge, at the time the *Horsa* left Philadelphia, nor while it was within the jurisdiction of the United States, that the charterer had arranged that the vessel, after it got beyond the jurisdiction of the United States, should receive on board individuals destined for Cuba, and who intended, after they arrived there, to arrange in the struggle to overthrow the authority of Spain in that island.

2 Independently of the view just expressed, this was not, I think, a military expedition or enterprise within the meaning of the statute. It had none of the features of such an expedition or enterprise. There was no commanding officer, whose orders were recognized and enforced. It was, at most, a small company of persons, no one of whom recognized the authority of another, although all desired the independence of Cuba, and had the purpose to reach that island, and engage, not as a body, but as individuals, in some form, in the civil war there pending—a loose, unorganized body, of very small dimensions, and without any surroundings that would justify its being regarded as a military expedition or enterprise to be carried on from this country.

